DOCKET

No. 13-1174

Title:	Ellen Gelboim. et al., Petitioners
	v.
	Bank of America Corporation. et al.
Docketed:	March 26, 2014
Linked with 13A913	
Lower Ct:	United States Court of Appeals for the Second Circuit
Case Nos.:	(13-3565, 13-3636)
Decision Date:	October 30, 2013
Rehearing Denied:	December 16, 2013

Questions Presented

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Mar 6 2014	Application (13A913) to extend the time to file a petition for a writ of certiorari from March 16, 2014 to April15, 2014, submitted to Justice Ginsburg.
Mar 7 2014	Application (13A913) granted by Justice Ginsburg extending the time to file until April15, 2014.
Mar 26 2014	Petition for a writ of certiorari filed. (Response due April25, 2014)
Apr 17 2014	Order extending time to file response to petition to and including May 27, 2014, for all respondents.
Apr 25 2014	Brief amici curiae of Mayor and City Council of Baltimore, et al. filed.
May 27 2014	Brief of respondents Bank of America Corporation, et al. in opposition filed.
Jun 3 2014	DISTRIBUTED for Conference of June 19, 2014.
Jun 3 2014	Reply of petitioners Ellen Gelboim, et al. filed. (Distributed)
Jun 23 2014	DISTRIBUTED for Conference of June 26, 2014.
Jun 24 2014	Letter of June 24, 2014, from counsel for petitioner received. (Distributed)
Jun 30 2014	Petition GRANTED.
Jul 8 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the petitioners.
Jul 18 2014	The time to file the joint appendix and petitioners' brief on the merits is extended to and including August 29, 2014.
Jul 18 2014	The time to file respondents' brief on the merits is extended to and including October 15, 2014.
Aug 4 2014	Consent to the filing of amicus curiae briefs, in support of either party or of neither party, received from counsel for the respondents.
Aug 29 2014	Joint appendix filed. (Statement of costs filed.)
Aug 29 2014	Brief of petitioner Ellen Gelboim, et al. filed.

Sep 4 2014	SET FOR ARGUMENT on Tuesday, December 9, 2014.
Sep 5 2014	Brief amici curiae of Mayor and City Council of Baltimore, et al. filed.
Sep 22 2014	Record requested from U.S.C.A. 2nd Circuit.
Sep 23 2014	Record received from U.S.D.C. Western District of North Carolina. The record is electronic.
Sep 24 2014	Record received from U.S.C.A. 2nd Circuit is electronic.
Oct 15 2014	Brief of respondents Bank of America Corporation, et al. filed.
Oct 22 2014	Brief amicus curiae of The Chamber of Commerce of The United States of America filed.
Oct 22 2014	Brief amici curiae of Retired United States District Judges filed. (Distributed)
Oct 27 2014	CIRCULATED.
Nov 14 2014	Reply of petitioners Ellen Gelboim, et al. filed. (Distributed)
Dec 9 2014	Argued. For petitioners: Thomas C. Goldstein, Bethesda, Md. For respondents: Seth P. Waxman, Washington, D.C.
Jan 21 2015	Judgment REVERSED and case REMANDED. Ginsburg, J., delivered the opinion for a unanimous Court.
Feb 23 2015	JUDGMENT ISSUED.

PETITION FOR WRIT OF CERTIORARI

13-1174

No. 13-_____

IN THE

Supreme Court of the United States

ELLEN GELBOIM AND LINDA ZACHER,
INDIVIDUALLY FOR THEMSELVES AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

CREDIT SUISSE GROUP AG, ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The question "whether consolidated cases retain their separate identity or become one case for purposes of appellate jurisdiction has divided the courts of appeals." *United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 216 (D.C. Cir. 2003). "Some circuits hold that consolidated cases remain separate actions and no Rule 54(b) certification is needed to appeal the dismissal of any one of them. Others treat consolidated cases as a single action, or presume that they are, allowing the presumption to be overcome in highly unusual circumstances. Still other circuits apply no hard and fast rule, but focus on the reasons for the consolidation to determine whether the actions are one or separate." *Id.* (citations and alterations omitted). This Court granted certiorari to resolve the conflict in *Erickson v. Maine Central Railroad Co.*, 111 S. Ct. 38 (1990) (mem.), but the petition was subsequently dismissed, 111 S. Ct. 662 (1990) (mem.).

The Question Presented is:

Whether and in what circumstances is the dismissal of an action that has been consolidated with other suits immediately appealable?

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Rule 14.1(b), the following parties were appellants below and petitioners in this Court:

Ellen Gelboim and Linda Zacher, individually for themselves and on behalf of all others similarly situated

The following parties were appellees below and are respondents in this Court:

Bank of America Corp.

Bank of America, N.A.

Barclays Bank plc

Citibank, N.A.

Citigroup Inc.

Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A.

Credit Suisse Group AG

Deutsche Bank AG

HSBC Holdings plc

HSBC Bank plc

JPMorgan Chase & Co.

JPMorgan Chase Bank, N.A.

Lloyds Banking Group plc

The Norinchukin Bank

Royal Bank of Canada

The Royal Bank of Scotland Group plc

The Bank of Tokyo-Mitsubishi UFJ, Ltd.

UBS AG

WestLB AG (n/k/a Portigon AG)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The district court's opinion granting respondents' motion to dismiss petitioners' claim (App. F) is published at 935 F. Supp. 2d 666. The district court's order denying petitioners leave to amend their complaint (App. G) is unpublished. The court of appeals' order dismissing petitioners' appeal (App. A) is unpublished.

JURISDICTION

The court of appeals entered its order dismissing petitioners' appeal (App. A) on October 30, 2013, and denied petitioners' timely request for reconsideration of that order (App. B) on December 16, 2013. On March 7, 2014, Justice Ginsburg extended the time to file this petition for certiorari to and including April 15, 2014. App. No. 13A913. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

28 U.S.C. § 1291 provides, in relevant part: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

STATEMENT OF THE CASE

Petitioners sued respondents in a complaint that was consolidated with other litigation for pretrial purposes only. The district court dismissed petitioners' sole claim for relief, and therefore their

complaint, with prejudice. The court of appeals dismissed petitioners' appeal for lack of appellate jurisdiction because the district court had not dismissed all of the consolidated complaints. Respondents acknowledged that the court's ruling was the subject of a significant circuit conflict.

1. This petition arises from litigation alleging that respondents manipulated the London Interbank Offered Rate ("LIBOR"), which is the most important benchmark for short-term interest rates in the United States and around the world. LIBOR ostensibly identifies banks' short-term borrowing costs. It is an essential financial term in countless financial instruments.

The British Bankers Association (BBA) publishes LIBOR every day in ten currencies, including U.S. dollars. Various banks—respondents here—together provided the information that the BBA used to set the U.S. dollar LIBOR. It has been revealed, however, that respondents conspired to manipulate LIBOR by submitting false information. The respondents' collusion suppressed LIBOR, which directly suppressed the payments on LIBOR-linked financial instruments, including the interest paid to floating rate bondholders for the use of their money.

2. Respondents' actions gave rise to a variety of suits by parties claiming that they were injured by the suppression of U.S. dollar LIBOR. The Judicial Panel on Multidistrict Litigation (JPML) ordered that LIBOR-related litigation be transferred for pretrial proceedings to the United States District Court for the Southern District of New York. App. 5a-7a; *see* 28

U.S.C. § 1407 ("When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings.").

The district court permitted one group of non-class action claims—those filed by entities related to Charles Schwab & Co. (Schwab)—to go forward. Schwab asserted a federal antitrust claim, as well as a state antitrust claim, a federal racketeering claim, and other state law claims.

The district court ordered that the LIBOR-related class actions be consolidated "for pretrial purposes only." App. 11a. The court did not direct the plaintiffs to file a single, integrated class action complaint. Rather, it ordered that the case proceed with respect to three separate class action complaints:

> a. The complaint filed by petitioners Ellen Gelboim and Linda Zacher on behalf of purchasers of bonds with LIBOR-linked interest rates, alleging a single claim that the defendants had violated federal antitrust law;
>
> b. A unified complaint on behalf of "over-the-counter" purchasers of LIBOR-linked instruments (the OTC plaintiffs), alleging a federal antitrust claim, as well as a state law claim for unjust enrichment;
>
> c. A unified complaint on behalf of purchasers of LIBOR-linked instruments on exchanges (the exchange plaintiffs), alleging a federal antitrust claim, Commodity Exchange Act claims based on

respondents' conduct regarding certain Eurodollar futures contracts, and a state law claim for unjust enrichment.

Subsequently, roughly thirty more LIBOR-related complaints were filed and transferred to the Southern District of New York. Those complaints largely raised the same allegations as the previously filed complaints. The court stayed all proceedings on those follow-on complaints. *See* App. 18a.

3. The district court granted respondents' motion to dismiss almost all the claims set forth in the four non-stayed cases. *Id.* 18a-19a, 155a-58a. The district court specifically held that none of the plaintiffs could assert antitrust claims because they failed to assert antitrust injury. *Id.* 59a, 155a-56a. That ruling disposed entirely of the only claim for relief asserted in petitioners' complaint, resulting in the dismissal of petitioners' action.

The district court further held that the plaintiffs could not assert a federal racketeering claim. *Id.* 124a, 157a. Having thereby dismissed all of Schwab's federal claims, the court declined to exercise supplemental jurisdiction over Schwab's remaining state law claims. *Id.* 147a, 157a.

Those rulings left pending a few claims in the non-stayed cases. The court denied respondents' motion to dismiss the exchange plaintiffs' claim under the Commodity Exchange Act. *Id.* 65a, 156a. The court also permitted the OTC plaintiffs to amend their complaint to assert state law claims for unjust enrichment and violation of the implied covenant of good faith and fair dealing. *Id.* 161a.

The court denied petitioners leave to file a second amended complaint. *Id.* 193a-200a. The court accordingly specified that the action was "dismissed in [its] entirety." *Id.* 219a. The case's docket provided that it was "terminat[ed] pursuant to instructions from Chambers." *Id.* 12a. (Because the district court did not enter judgment on a separate document as required by Federal Rule of Civil Procedure 58(b)(1)(C), judgment on its decision denying all relief in petitioners' action was deemed entered after 150 days pursuant to Federal Rule of Civil Procedure 58(c)(2)(B).)

4. Federal law gives the courts of appeals "jurisdiction of appeals from all final decisions of the district courts." 28 U.S.C. § 1291. Petitioners accordingly filed a timely notice of appeal, as did Schwab.

The district court then entered judgment under Federal Rule of Civil Procedure 54(b) to permit the exchange plaintiffs and OTC plaintiffs to appeal with respect to their antitrust claims, which paralleled those of the petitioners and Schwab. The court explained that petitioners and Schwab were "in a position to appeal as of right because their complaints were dismissed in their entirety." App. 220a. Further, the issues on appeal "rais[e] issues that affect all four categories of plaintiffs equally." *Id.* In those circumstances, "there is no just reason for delay." *Id.* 221a.

The court of appeals, however, dismissed petitioners' appeal, stating:

> This Court has determined *sua sponte* that it lacks jurisdiction over these appeals because a final order has not been issued by the district court as contemplated by 28 U.S.C. § 1291, and the orders appealed from did not dispose of all claims in the consolidated action. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978); *Houbigant, Inc. v. IMG Fragrance Brands, LLC*, 627 F.3d 497, 498 (2d Cir. 2010) (per curiam). Upon due consideration, it is hereby ORDERED that the appeals are DISMISSED.

App. 2a. The Second Circuit precedent cited by the court's order, *Houbigant*, 627 F.3d at 498, applied that court's prior ruling that "when there is a judgment in a consolidated case that does not dispose of all the claims which have been consolidated, there is a strong presumption that the judgment is not appealable absent Rule 54(b) certification." *Hageman v. City Investing Co.*, 851 F.2d 69, 71 (2d Cir. 1988). That presumption may be overcome only in "highly unusual circumstances." *Id.*

In response to the court of appeals' dismissal of the appeals, the district court then withdrew its own order permitting the exchange plaintiffs and OTC plaintiffs to appeal under Rule 54(b). App. 222a.

Petitioners sought reconsideration. In their opposition to that request (at 9), respondents explained that the Second Circuit had "expressly considered and rejected the bright-line rules utilized in similar contexts by the First and Sixth Circuits (interim appeals always allowed in consolidated actions) and the Ninth and Tenth Circuits (interim

appeals never allowed in consolidated actions), as well as the flexible approaches of adopted by the Third, Fifth, and Seventh Circuits." The rulings of other circuits that would permit petitioners' appeal were, respondents explained (at 11), "non-binding precedent." The court of appeals denied reconsideration. App. 4a.

This petition followed.

REASONS FOR GRANTING THE WRIT

This case is an ideal vehicle to resolve the four-way circuit conflict—involving every court of appeals but one—over whether and when the dismissal of an action that has been consolidated with other actions is an appealable final order. Like respondents in opposing petitioners' request for reconsideration, the courts of appeals have repeatedly acknowledged the conflict—indeed, they have done so for more than a quarter century. *See, e.g.*, *United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 216 (D.C. Cir. 2003) ("Whether consolidated cases retain their separate identity or become one case for purposes of appellate jurisdiction has divided the courts of appeals."); *Spraytex, Inc. v. DJS&T & Homax Corp.*, 96 F.3d 1377, 1380 (Fed. Cir. 1996) ("Our sister circuits have answered this fundamental question in three different ways."); *Road Sprinkler Fitters Local Union v. Cont'l Sprinkler Co.*, 967 F.2d 145, 148 (5th Cir. 1992) ("A divergence of opinion exists among these courts as to the appealability of a judgment in one but not all of the actions."); *Albert v. Maine Cent. R.R. Co.*, 898 F.2d 5, 7 (1st Cir. 1990) ("Other courts have taken different approaches to this issue."), *cert. granted sub*

nom, *Erickson v. Maine Cent. R.R. Co.*, 111 S. Ct. 38 (mem.), *cert. dismissed*, 111 S. Ct. 662 (1990) (mem.); *Hageman v. City Investing Co.*, 851 F.2d 69, 71 (2d Cir. 1988) ("We have not previously considered this precise question. Several other circuits have decided it, however, although they have come to differing conclusions."); *Trinity Broad. Corp. v. Eller*, 827 F.2d 673, 675 (10th Cir. 1987) (summarizing the conflict), *cert. denied*, 108 S. Ct. 2883 (1988) (mem.).

This Court granted certiorari to resolve the conflict in *Erickson v. Maine Central Railroad Co.*, 111 S. Ct. 38 (1990) (mem.), but the petition was subsequently dismissed, 111 S. Ct. 662 (1990) (mem.).

1. Petitioners would not have been permitted to appeal in the Federal, Ninth, and Tenth Circuits, which apply a categorical rule that the dismissal of one of several consolidated cases is not immediately appealable. *See Spraytex*, 96 F.3d 1377 at 1381 ("We now extend this approach to join the Ninth and Tenth Circuits in adopting the rule that, absent Rule 54(b) certification, there may be no appeal of a judgment disposing of fewer than all aspects of a consolidated case."); *Trinity*, 827 F.2d at 675 ("We agree with the Ninth Circuit's approach, and adopt the rule that a judgment in a consolidated action that does not dispose of all claims shall not operate as a final, appealable judgment under 28 U.S.C. § 1291."); *Huene v. United States*, 743 F.2d 703, 705 (9th Cir. 1984) ("In our view, the best approach is to permit the appeal only when there is a final judgment that resolves all of the consolidated actions unless a 54(b) certification is entered by the district court.").

Petitioners were forbidden to appeal by the Second Circuit, which adopts a near-*per se* bar to appeal. In *Hageman*, the Second Circuit "agree[d] with the Ninth and Tenth Circuits that there are certain benefits to adopting a uniform rule [forbidding all such appeals], rather than a more flexible approach." 851 F.2d at 71. But the court was "somewhat hesitant to adopt an absolute rule," and thought it better to "preserv[e] some flexibility," in light of "the infinite array of consolidated actions that can arise." *Id.* On that basis, the court adopted "a strong presumption that the judgment is not appealable," which may only be overcome "[i]n highly unusual circumstances." *Id.*

By contrast, petitioners would have been permitted to appeal in the First and Sixth Circuits, which apply the opposite categorical rule that the dismissal of one of several consolidated cases is immediately appealable. *See Beil v. Lakewood Eng'g & Mfg. Co.*, 15 F.3d 546, 551 (6th Cir. 1994) ("This court has held that consolidated cases remain separate actions. Thus, a case which is disposed on summary judgment is appealable pursuant to 28 U.S.C. § 1291 despite the fact that the case with which it is consolidated has not been disposed."); *Albert*, 898 F.2d at 7 (even consolidation for trial is insufficient to "merge separate suits into a single action," as the suits "retain their separate identity and judgments rendered in each individual action are appealable as final judgments" (citation omitted)); *see also In re Refrigerant Compressors Antitrust Litig.*, 731 F.3d 586, 589 (6th Cir. 2013) (immediate appeal is permitted from dismissal of suit subject to MDL consolidation, so

long as non-dismissed actions were not part of same filed complaint).

So too, petitioners would have been permitted to appeal in the D.C., Third, Fifth, Seventh, Eighth, and Eleventh Circuits. Those courts nominally apply a case-by-case approach. But that approach dictates that an immediate appeal is permitted whenever the underlying complaint was not consolidated with still-pending suits for *all* purposes. *See Schippers v. United States*, 715 F.3d 879, 884 (11th Cir. 2013) (immediate appeal is permitted when "the district court did not consolidate the cases 'for all purposes'; rather, the cases were consolidated for pre-trial and discovery purposes"); *Hampton*, 318 F.3d at 216 (where actions were not consolidated "for all purposes," then "[d]espite the consolidation, [the dismissed] action retained its separate status and the order dismissing it was a final judgment, appealable without the need for a Rule 54(b) certification."); *Tri-State Hotels, Inc. v. FDIC*, 79 F.3d 707, 711-12 (8th Cir. 1996) (when suits were consolidated "for joint proceedings and hearings, for convenience, then each suit retains its individual nature, and appeal in one suit is not precluded solely because the other suit is still pending before the district court[,]" even when "the district court grouped both suits under a single docket number") (citation omitted); *Hall v. Wilkerson*, 926 F.2d 311, 314 (3d Cir. 1991) (the "dispositive" factor is "whether the cases were consolidated for trial or simply for pre-trial administration"); *Brown v. United States*, 976 F.2d 1104, 1107 (7th Cir. 1992) ("[W]here it is clear that cases have been consolidated only for limited purposes, a decision disposing of all the claims in only one of the

cases is a final decision subject to immediate appeal."); *Road Sprinkler Fitters Local*, 967 F.2d at 149 (appeal is precluded only where "consolidation of causes that could have been filed as a single suit existed, and the consolidation was clearly for all purposes" (citation omitted)).

Particularly relevant here, under that rule, the dismissal of a single action consolidated for pretrial purposes in an MDL action—*i.e.*, the circumstances of this case—is immediately appealable. For example, in *Hampton*, the D.C. Circuit held that a party may appeal the dismissal of a single action that had been transferred by the MDL panel and consolidated by the district court for pretrial proceedings with roughly thirty cases relating to fraud by Columbia/HCA. 318 F.3d at 216. And in *Brown*, the Seventh Circuit held that a plaintiff could immediately appeal from the dismissal of a suit that had been transferred by the MDL panel "for coordinated or consolidated pretrial proceedings," and consolidated with other actions for pretrial proceedings by the transferee district court. 976 F.3d at 1106.

Only the Fourth Circuit has not decided the Question Presented expressly, but it has strongly signaled its agreement with a case-by-case approach. *Eggers v. Clinchfield Coal Co.*, 11 F.3d 35, 38-39 (4th Cir. 1993) (adopting interpretation of the right to appeal under 33 U.S.C. § 921 based on case law interpreting 28 U.S.C. § 1291).

2. There can be no dispute that the Question Presented is sufficiently important to merit this Court's attention. The issue has the potential to arise

not only from every body of litigation that is subject to coordination by the Judicial Panel on Multidistrict Litigation, but each time a district court consolidates related actions. The frequency with which the issue arises is obvious from the fact that every court of appeals but one has already squarely decided it. For precisely that reason, the circuits' positions are well defined and fixed, so that there is no benefit to permitting the conflict—which has already existed for at least a quarter century—to fester any longer. The circuit split confounds a frequently recurring issue that should be clear and uniform: the interplay between 28 U.S.C. § 1291, Federal Rule of Civil Procedure 42(a), Federal Rule of Civil Procedure 54(b), and (in multidistrict proceedings) 28 U.S.C. § 1407.

This case is moreover an ideal vehicle in which to resolve the conflict. The Second Circuit dismissed petitioners' appeal in an order that rested exclusively on that court's near-*per se* bar to the immediate appeal from the dismissal of a consolidated action. In the proceedings below, respondents expressly acknowledged that the circuit split is determinative of petitioners' right to pursue their appeal. Finally, the significance of the legal issues raised by the well-known allegations that the defendants manipulated LIBOR cannot be disputed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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March 26, 2014

APPENDIX

APPENDIX A

S.D.N.Y.–N.Y.C.
11-md-2262 Buchwald, J.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30th day of October, two thousand thirteen.

Present:

José A. Cabranes,

Barrington D. Parker[1],

Circuit Judges.

In re LIBOR-Based Financial Instruments Antitrust Litigation. 13-3565 (L); 13-3636 (Con)

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[1] The Honorable John M. Walker, originally a member of the panel sitting on October 29, 2013, recused himself from consideration of this matter. The remaining members of this panel, who are in agreement, have decided this case pursuant to 2d Cir. R § 0.14(b).

Ellen Gelboim, *et al.*,
Plaintiffs - Appellants,

v.

Bank of America Corporation, *et al.*,
Defendants - Appellees.

This Court has determined *sua sponte* that it lacks jurisdiction over these appeals because a final order has not been issued by the district court as contemplated by 28 U.S.C. § 1291, and the orders appealed from did not dispose of all claims in the consolidated action. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978); *Houbigant, Inc. v. IMG Fragrance Brands, LLC*, 627 F.3d 497, 498 (2d Cir. 2010) (per curiam). Upon due consideration, it is hereby ORDERED that the appeals are DISMISSED.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16th day of December, two thousand and thirteen.

Before: José A. Cabranes
Barrington D. Parker*,
Circuit Judges.

Ellen Gelboim, on behalf of herself and all others similarly situated, *et al.*,

Plaintiffs-Appellants

v.

Bank of America Corporation, *et al.*,

Defendants Appellees,

Lloyds Banking Group plc, *et al.*,

Defendants

ORDER

Docket No. 13-3565 (L); 13-3636 (con)

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* The Honorable John M. Walker, Jr., originally a member of the panel sitting on October 29, 2013, recused himself from consideration of this matter. The remaining members of this panel, who are in agreement, have decided this case pursuant to Second Circuit Internal Operating Procedure E(b).

Appellants move for reconsideration of this Court's order of October 30, 2013, which dismissed these appeals *sua sponte*, and for reinstatement.

Upon due consideration, IT IS HEREBY ORDERED that the motions are DENIED.

For the Court:

Catherine O'Hagan Wolfe,

Clerk of Court

APPENDIX C

UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION

IN RE: LIBOR-BASED FINANCIAL INSTRUMENTS ANTITRUST LITIGATION — MDL No. 2262

TRANSFER ORDER

Before the Panel:[1] Pursuant to 28 U.S.C. § 1407, plaintiff in an action pending in the Southern District of New York (*Ravan Investments*) moves to centralize this litigation in that district.

The motion encompasses seven actions: four in the Southern District of New York and three in the Northern District of Illinois, as listed on Schedule A. The Panel has been notified of ten additional related actions.[2]

All responding parties support centralization, but there is disagreement as to an appropriate transferee district. All responding defendants[3] support

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[1] Judge John G. Heyburn II, Judge Paul J. Barbadoro, and Judge Marjorie O. Rendell took no part in the disposition of this matter.

[2] These actions and any other related actions are potential tag-along actions. *See* Rules 1.1(h), 7.1, and 7.2.

[3] The Norinchukin Bank; Bank of America Corporation; The Bank of Tokyo-Mitsubishi UFJ, Ltd.; Barclays Bank plc; Citibank, N.A.; Credit Suisse Group AG; Deutsche Bank AG; HBOS plc; J.P. Morgan Chase & Co.; Lloyds Banking Group plc;

centralization in the Southern District of New York, as do plaintiffs in the first-filed *FTC Capital* action, which is pending in that district, and plaintiffs in two Southern District of New York potential tag-along actions. Plaintiffs in the three actions pending in the Northern District of Illinois, however, argue for centralization in that district, as does plaintiff in a Northern District of Illinois potential tag-along action. Finally, plaintiffs in potential tag-along actions pending in the District of Minnesota and the District of New Jersey argue for selection of their respective districts.

On the basis of the papers filed and hearing session held, we find that these seven actions involve common questions of fact, and that centralization under Section 1407 in the Southern District of New York will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. All seven actions share factual issues arising from allegations concerning defendants' participation in the British Bankers' Association (BBA) London Interbank Offered Rate (Libor) panel. More specifically, plaintiffs allege that defendants manipulated Libor by deliberately and intentionally understating their respective borrowing costs to the BBA, and that, by doing so, they paid lower interest rates to customers who bought defendants' products with rates of return tied to Libor, and also avoided disclosing the true risk premium that the market was

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Coöoperative Centrale Raiffeisen Boerenleenbank B.A.; the Royal Bank of Canada; The Royal Bank of Scotland Group plc; Société Générale; UBS AG; and WestLB AG.

attaching to them during the global financial crisis. Centralization under Section 1407 will eliminate duplicative discovery, prevent inconsistent pretrial rulings on class certification, discovery, and other pretrial issues, and conserve the resources of the parties, their counsel and the judiciary.

We conclude that the Southern District of New York is an appropriate transferee district for pretrial proceedings in this litigation. Two of the three United States-based defendants have their headquarters in that district, and it is also relatively more convenient for those defendants based in the United Kingdom and Europe. At least some foreign discovery in this docket appears probable. As proponents of selection of the Southern District of New York argue, the actions involve the alleged manipulation of an interest rate benchmark determined in London. Discovery thus will almost certainly encompass (and, indeed, likely focus on) the setting of Libor rates, defendants' alleged underreporting of the cost of actual borrowing, communications by defendants regarding Libor, and defendants' profits from Libor-based transactions. Although the litigation may entail some discovery regarding the trading of Libor-based derivatives on the Chicago exchanges, it appears that most discovery will be concentrated elsewhere.

IT IS THEREFORE ORDERED that pursuant to 28 U.S.C. § 1407, the actions listed on Schedule A and pending outside the Southern District of New York are transferred to the Southern District of New York and, with the consent of that court, assigned to the Honorable Naomi Reice Buchwald for coordinated or consolidated pretrial proceedings with the actions pending in that district and listed on Schedule A.

PANEL ON MULTIDISTRICT LITIGATION

/s/ Kathryn H. Vratil
Acting Chairman

W. Royal Furgeson, Jr. Frank C. Damrell, Jr.
Barbara S. Jones

IN RE: LIBOR-BASED FINANCIAL INSTRUMENTS ANTITRUST LITIGATION MDL No. 2262

SCHEDULE A

Northern District of Illinois

Richard Hershey v. Credit Suisse Group AG, et al., C.A. No. 1:11-02625

Brian McCormick, et al. v. Bank of America Corporation, et al., C.A. No. 1:11-02706

Jeffrey Laydon v. Credit Suisse Group AG, et al., C.A. No. 1:11-02824

Southern District of New York

FTC Capital GMBH, et al. v. Credit Suisse Group AG, et al., C.A. No. 1:11-02613

Carpenters Pension Fund of West Virginia v. Bank of America Corporation, et al., C.A. No. 1:11-02883

City of Dania Beach Police & Firefighters' Retirement System v. Bank of America Corporation, et al., C.A. No. 1:11-03128

Ravan Investments, LLC v. Bank of America Corporation, et al., C.A. No. 1:11-03249

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: LIBOR-Based Financial Instruments Antitrust Litigation.

THIS DOCUMENT RELATES TO: Exchange-Based Plaintiff Action

11 MD 2262 (NRB)

MEMORANDUM AND ORDER

In our Memorandum and Order of November 29, 2011, we granted counsel's request to consolidate the class action complaints then-pending before the Court pursuant to Federal Rule of Civil Procedure 42(a). (Docket No. 66 at 10.) In the course of our research, we have realized that the consolidation pursuant to Rule 42(a) was in error given that our authority over actions transferred from districts outside of the Southern District of New York extends only to pretrial matters, while Rule 42 effectuates consolidation for all purposes (including trial) See 17 Moore's Federal Practice § 112.07[b] (3d ed. 2012) (*citing Shulman v. Goldman, Sachs & Co. (In re Penn Cent. Commercial Paper Litig.*), 62 F.R.D. 341, 344 (S.D.N.Y. 1974), *aff'd* 515 F.2d 505 (2d Cir. 1975)).

This error does not affect the class structure and motion schedule that has been put into place, as such measures fall within the Court's authority to coordinate and consolidate pretrial proceedings pursuant to 28 U.S.C. § 1407. *See In re Packaged Ice Antitrust Litig.*, No. 08 Md. 1952 (E.D. Mich.) (similarly appointing interim class counsel for distinct

classes of plaintiffs, directing the filing amended complaints for each class, and ruling on dispositive motions as to each class); *In re Rail Freight Surcharge Antitrust Litig.*, No. 07 Md. 1869 (D. D. C.) (same).

Accordingly, we reverse our previous consolidation order pursuant to Rule 42(a) and instead consolidate the class action complaints pending in the MDL for pretrial purposes only.

SO ORDERED.

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
July 18, 2012

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In re: LIBOR-Based Financial Instruments Antitrust Litigation.
11 MD 2262 (NRB)

CIVIL DOCKET FOR CASE #: 1:12-cv-01025-NRB
Gelboim et al. v. Credit Suisse Group AG et al

Text of Docket Entry No. 43, Mar. 29, 2013

MEMORANDUM AND ORDER granting in part and denying in part 25 Motion to Dismiss; terminating pursuant to instructions from Chambers; 32 Motion to Dismiss. For the reasons stated above, defendants motions to dismiss are granted in part and denied in part. First, defendants motion to dismiss plaintiffs federal antitrust claim is granted. Regardless of whether defendants conduct constituted a violation of the antitrust law "antitrust injury." An antitrust injury is an injury that results from an anticompetitive aspect of defendants conduct. Here, although plaintiffs have alleged that defendants conspired to suppress LIBOR over a nearly three-year-long period and that they were injured as a result, they have not alleged that their injury resulted from any harm to competition. The process by which banks submit LIBOR quotes to the BBA is not itself competitive, and plaintiffs have not alleged that defendants conduct had an anticompetitive effect in any market in which

defendants compete. Because plaintiffs have not alleged an antitrust injury, their federal antitrust claim is dismissed. Second, defendants' motion to dismiss plaintiffs' commodities manipulation claims is granted in part and denied in part. Contrary to defendants' arguments, plaintiffs' claims do not involve an impermissible extraterritorial application of the CEA, and plaintiffs have adequately pleaded their claims. However, certain of plaintiffs' claims are time-barred because numerous articles published in April and May 2008 in prominent national publications placed plaintiffs on notice of their injury. Therefore, plaintiffs commodities manipulation claims based on contracts entered into between August 2007 and May 29, 2008, are time-barred. However, plaintiffs claims based on contracts entered into between April 15, 2009, and May 2010 are not time-barred, and plaintiffs' claims based on contracts entered into between May 30, 2008, and April 14, 2009, may or may not be barred, though we will not dismiss them at this stage. Additionally, because the Barclays settlements brought to light information that plaintiffs might not previously have been able to learn, we grant plaintiffs leave to move to amend their complaint to include allegations based on such information, provided that any such motion addresses the concerns raised herein and is accompanied by a proposed second amended complaint. Third, defendants' motion to dismiss plaintiffs' RICO claim is granted. For one, the PSLRA bars plaintiffs from bringing a RICO claim based on predicate acts that could have been the subject of a securities fraud action. Here, the predicate acts of mail and wire fraud underlying plaintiffs' RICO claim could have been the subject of a claim for securities fraud. Additionally, RICO applies only domestically, meaning

that the alleged enterprise must be a domestic enterprise. However, the enterprise alleged by plaintiffs is based in England. For these reasons, plaintiffs RICO claim is dismissed. Finally, plaintiffs' state-law claims are all dismissed, some with prejudice and some without. Plaintiffs' Cartwright Act claim is dismissed with prejudice for lack of antitrust injury. The exchange–based plaintiffs' New York common law unjust enrichment claim is also dismissed with prejudice, as plaintiffs have not alleged any relationship between them and defendants. With regard to the remaining state-law claims, we decline to exercise supplemental jurisdiction and We recognize that it might be unexpected that we are dismissing a substantial portion of plaintiffs claims, given that several of the defendants here have already paid penalties to government regulatory agencies reaching into the billions of dollars. However, these results are not as incongruous as they might seem. Under the statutes invoked here, there are many requirements that private plaintiffs must satisfy, but which government agencies need not. The reason for these differing requirements is that the focuses of public enforcement and private enforcement, even of the same statutes, are not identical. The broad public interests behind the statutes invoked here, such as integrity of the markets and competition, are being addressed by ongoing governmental enforcement. While public enforcement is often supplemented by suits brought by private parties acting as "private attorneys general," those private actions which seek damages and attorneys fees must be examined closely to ensure that the plaintiffs who are suing are the ones properly entitled to recover and that the suit is, in fact, serving the public purposes of the laws being invoked.

Therefore, although we are fully cognizant of the settlements that several of the defendants here have entered into with government regulators, we find that only some of the claims that plaintiffs have asserted may properly proceed. (Signed by Judge Naomi Reice Buchwald on 3/29/2013) (tro) Modified on 4/2/2013 (tro). (Entered: 03/29/2013)

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In re: LIBOR-Based Financial Instruments Antitrust Litigation.
THIS DOCUMENT RELATES TO: All Cases

11 MD 2262 (NRB)
March 29, 2013, Decided
March 29, 2013, Filed

MEMORANDUM AND ORDER

I. Introduction

These cases arise out of the alleged manipulation of the London InterBank Offered Rate ("LIBOR"), an interest rate benchmark that has been called "the world's most important number." British Bankers' Ass'n, *BBA LIBOR: The World's Most Important Number Now Tweets Daily* (May 21, 2009), http://www.bbalibor.com/news-releases/bba-libor-the-worlds-most-important-number-now-tweets-daily. As numerous newspaper articles over the past year have reported, domestic and foreign regulatory agencies have already reached settlements with several banks involved in the LIBOR-setting process, with penalties reaching into the billions of dollars.

The cases presently before us do not involve governmental regulatory action, but rather are private lawsuits by persons who allegedly suffered harm as a result of the suppression of LIBOR. Starting in mid-

2011, such lawsuits began to be filed in this District and others across the country. On August 12, 2011, the Judicial Panel on Multidistrict Litigation transferred several such cases from other districts to this Court for "coordinated or consolidated pretrial proceedings." *In re Libor-Based Fin. Instruments Antitrust Litig.*, 802 F. Supp. 2d 1380, 1381 (J.P.M.L. 2011); *see also* 28 U.S.C. § 1407 (2006).

On June 29, 2012, defendants filed motions to dismiss. Four categories of cases are subject to defendants' motions to dismiss: cases brought by (1) over-the-counter ("OTC") plaintiffs, (2) exchange-based plaintiffs, (3) bondholder plaintiffs, and (4) Charles Schwab plaintiffs (the "Schwab plaintiffs"). The first three categories each involve purported class actions, and each has a single lead action. The lead action for the OTC plaintiffs is *Mayor and City Council of Baltimore v. Bank of America* (11 Civ. 5450); the lead action for the exchange-based plaintiffs is *FTC Capital GmbH v. Credit Suisse Group* (11 Civ. 2613), and the lead action for the bondholder plaintiffs is *Gelboim v. Credit Suisse Group* (12 Civ. 1025). By contrast, the Schwab plaintiffs do not seek to represent a class, but rather have initiated three separate cases: *Schwab Short-Term Bond Market Fund v. Bank of America Corp.* (11 Civ. 6409), *Charles Schwab Bank, N.A. v. Bank of America Corp.* (11 Civ. 6411), and *Schwab Money Market Fund v. Bank of America Corp.* (11 Civ. 6412).

Subsequent to defendants' filing of their motion to dismiss, several new complaints were filed. It quickly became apparent to us that information relating to

this case would continue indefinitely to come to light, that new complaints would continue to be filed, and that waiting for the "dust to settle" would require an unacceptable delay in the proceedings.

Therefore, on August 14, 2012, we issued a Memorandum and Order imposing a stay on all complaints not then subject to defendants' motions to dismiss, pending the present decision. *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MD 2262, 2012 WL 3578149 (S.D.N.Y. Aug. 14, 2012). Although we encouraged the prompt filing of new complaints, *see id.* at *1 n.2, we determined that the most sensible way to proceed would be to wait on addressing those cases until we had clarified the legal landscape through our decision on defendants' motions.

For the reasons stated below, defendants' motions to dismiss are granted in part and denied in part. With regard to plaintiffs' federal antitrust claim[1] and RICO claim, defendants' motions are granted. With regard to plaintiffs' commodities manipulation claims, defendants' motions are granted in part and denied in part. Finally, we dismiss with prejudice the Schwab plaintiffs' Cartwright Act claim and the exchange-

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[1] Because each amended complaint asserts only one federal antitrust claim, we will refer in the singular to plaintiffs' federal antitrust "claim." Similarly, because each of the Schwab amended complaints asserts one RICO claim and one Cartwright Act claim, we will refer in the singular to the Schwab plaintiffs' RICO "claim" and Cartwright Act "claim."

based plaintiffs' state-law claim, and we decline to exercise supplemental jurisdiction over the remaining state-law claims.

II. Background

Despite the legal complexity of this case, the factual allegations are rather straightforward. Essentially, they are as follows: Defendants are members of a panel assembled by a banking trade association to calculate a daily interest rate benchmark. Each business day, defendants submit to the association a rate that is supposed to reflect their expected costs of borrowing U.S. dollars from other banks, and the association computes and publishes the average of these submitted rates. The published average is used as a benchmark interest rate in financial instruments worldwide. According to plaintiffs, defendants conspired to report rates that did not reflect their good-faith estimates of their borrowing costs, and in fact submitted artificial rates over the course of thirty-four months. Because defendants allegedly submitted artificial rates, the final computed average was also artificial. Plaintiffs allege that they suffered injury because they held positions in various financial instruments that were negatively affected by defendants' alleged fixing of the benchmark interest rate.

As one would expect, the parties' primary factual disagreement concerns whether defendants conspired to submit artificial rates and whether they in fact did so. Plaintiffs have included in their complaints extensive evidence that allegedly supports their allegations on these points, and defendants, were this

case to proceed to trial, would surely present evidence to the contrary with equal vigor. However, our present task is not to resolve the parties' factual disagreements, but rather to decide defendants' motions to dismiss. These motions raise numerous issues of law, issues that, although they require serious legal analysis, may be resolved without heavy engagement with the facts. Therefore, we will set out in this section only those factual allegations necessary to provide context for our decision, and will cite further allegations later as appropriate. This section will begin by explaining what LIBOR is and will then discuss defendants' alleged misconduct and how it allegedly injured plaintiffs.

A. LIBOR

LIBOR is a benchmark interest rate disseminated by the British Bankers' Association (the "BBA"), a "leading trade association for the U.K. banking and financial services sector." OTC Am. Compl. ¶ 42 (quoting BBA, *About Us*, http://www.bba.org.uk/about-us (last visited Mar. 29, 2013)).[2] LIBOR is calculated

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[2] The six amended complaints subject to defendants' motions to dismiss are essentially identical in their allegations regarding the background of this case and the misconduct that defendants allegedly committed. Therefore, in section A, providing background on LIBOR, and section B, discussing defendants' alleged misconduct, we will cite exclusively to the OTC Amended Complaint, with the understanding that parallel allegations are contained in most or all of the other amended complaints. By contrast, the primary areas in which the amended complaints differ are in their allegations of who the plaintiffs are, how they were allegedly injured, and what claims they are asserting

for ten currencies, including the U.S. dollar ("USD LIBOR"). *Id.* ¶ 43. For each of the currencies, the BBA has assembled a panel of banks whose interest rate submissions are considered in calculating the benchmark (a "Contributor Panel"); each member of the Contributor Panel must be a bank that "is regulated and authorized to trade on the London money market." *Id.* ¶ 46. The Contributor Panel for USD LIBOR, the only rate at issue in this case, consisted at all relevant times of sixteen banks. The defendants here, or one of their affiliates, are each members of that panel.

Each business day, the banks on a given LIBOR Contributor Panel answer the following question, with regard to the currency for which the bank sits on the Contributor Panel: "At what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11 am?" *Id.* ¶ 48. Importantly, this question does not ask banks to report an interest rate that they actually paid or even an average of interest rates that they actually paid; rather, it inquires at what rate the banks "predict they can borrow unsecured funds from other banks in the London wholesale money market." *Id.* ¶ 44. Each bank will answer this question with regard to fifteen maturities,

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against defendants. Accordingly, in Part C, when we discuss plaintiffs' alleged injury, we will explore the allegations particular to specific amended complaints.

or tenors, ranging from overnight to one year. *Id.*; Settlement Agreement Between Dep't of Justice, Criminal Div., and Barclays (June 26, 2012), Appendix A, ¶ 5, Ex. 3, Scherrer Decl. [hereinafter DOJ Statement]. The banks submit rates in response to this question ("LIBOR quotes" or "LIBOR submissions") each business day by 11:10 AM London time to Thomson Reuters, acting as the BBA's agent. OTC. Am. Compl. ¶ 47; DOJ Statement ¶ 3. Each bank "must submit its rate without reference to rate contributed by other Contributor Panel banks." DOJ Statement ¶ 6.

After receiving quotes from each bank on a given panel, Thomson Reuters determines the LIBOR for that day (the "LIBOR fix") by ranking the quotes for a given maturity in descending order and calculating the arithmetic mean of the middle two quartiles. OTC Am. Compl. ¶ 48; DOJ Statement ¶ 4. For example, suppose that on a particular day, the banks on the Contributor Panel for U.S. dollars submitted the following quotes for the three-month maturity ("three-month USD LIBOR"): 4.0%, 3.9%, 3.9%, 3.9%, 3.8%, 3.8%, 3.7%, 3.6%, 3.5%, 3.5%, 3.4%, 3.3%, 3.3%, 3.1%, 3.0%, and 3.0%. The quotes in the middle two quartiles would be: 3.8%, 3.8%, 3.7%, 3.6%, 3.5%, 3.5%, 3.4%, and 3.3%. The arithmetic mean of these quotes, 3.575%, would be the LIBOR fix for that day.

Thomson Reuters publishes the new LIBOR fix each business day by approximately 11:30 AM London time. DOJ Statement ¶ 5. In addition to publishing the final fix, "Thomson Reuters publishes each Contributor Panel bank's submitted rates along with

the names of the banks." *Id.* Therefore, it is a matter of public knowledge not only what the LIBOR fix is on any given business day, but also what quote each bank submitted and how the final fix was calculated.

LIBOR is "the primary benchmark for short term interest rates globally." OTC Am. Compl. ¶ 44. For example, market actors "commonly set the interest rate on floating-rate notes [in which the seller of the note pays the buyer a variable rate] as a spread against LIBOR," such as LIBOR plus 2%, and "use LIBOR as a basis to determine the correct rate of return on short-term fixed-rate notes [in which the seller of the note pays the buyer a fixed rate] (by comparing the offered rate to LIBOR)." In short, LIBOR "affects the pricing of trillions of dollars' worth of financial transactions." *Id.* ¶ 45.

B. Defendants' Alleged Misconduct

According to plaintiffs, "Defendants collusively and systematically suppressed LIBOR during the Class Period," defined as August 2007 to May 2010. OTC Am. Compl. ¶ 2; *see also id.* ¶¶ 4-8; Exchange Am. Compl. ¶ 1. Defendants allegedly did so by each submitting an artificially low LIBOR quotes to Thomson Reuters each business day during the Class Period. OTC Am. Compl. ¶ 6.

Plaintiffs argue that defendants had two primary motives for suppressing LIBOR. First, "well aware that the interest rate a bank pays (or expects to pay) on its debt is widely, if not universally, viewed as embodying the market's assessment of the risk associated with that bank, Defendants understated their borrowing costs (thereby suppressing LIBOR) to

portray themselves as economically healthier than they actually were." OTC Am. Compl. ¶ 5. Moreover, "because no one bank would want to stand out as bearing a higher degree of risk than its fellow banks, each Defendant shared a powerful incentive to collude with its co-Defendants to ensure it was not the 'odd man out.'" *Id.* ¶ 52. Second, "artificially suppressing LIBOR allowed Defendants to pay lower interest rates on LIBOR-based financial instruments that Defendants sold to investors, including [plaintiffs], during the Class Period." *Id.* ¶ 5; *see also id.* ¶ 53.

Plaintiffs devote the bulk of their complaints to amassing evidence that LIBOR was fixed at artificially low levels during the Class Period. For one, plaintiffs offer statistical evidence showing that LIBOR diverged during the Class Period from benchmarks that it would normally track. First, each defendant's LIBOR quotes allegedly diverged over the Class Period from its probabilities of default, as calculated by experts retained by plaintiffs. OTC Am. Compl. ¶¶ 57-66. A bank's probability of default should correlate positively with its cost of borrowing, based on the basic principle that "investors require a higher . . . rate of return as a premium for taking on additional risk exposure." *Id.* ¶ 59. However, plaintiffs' experts found "a striking negative correlation between USD-LIBOR panel bank's LIBOR quotes and [probabilities of default] during 2007 and 2008." *Id.* ¶ 66. This suggests that defendants "severely depressed LIBOR during that time." *Id.*

Second, LIBOR diverged during the Class Period from another comparable benchmark, the Federal

Reserve Eurodollar Deposit Rate (the "Fed Eurodollar Rate"). Eurodollars are defined as "U.S. dollars deposited in commercial banks outside the United States." Exchange Am. Compl. ¶ 200 (quoting CME Group, *Eurodollar Futures*, http://www.cmegroup.com/trading/interest-rates/files/IR148_Eurodollar_Futures_Fact_Card.pdf). Like LIBOR, the Fed Eurodollar Rate "reflect[s] the rates at which banks in the London Eurodollar money market lend U.S. dollars to one another," OTC Am. Compl. ¶ 68, though because LIBOR is based on the interest rate that banks expect lenders to offer them (an "offered rate"), whereas the Fed Eurodollar Rate is based on what banks are willing to pay to borrow (a "bid rate"), "the Fed's Eurodollar rate should be less than LIBOR." Scott Peng et al., Citigroup, *Special Topic: Is LIBOR Broken?*, Apr. 10, 2008. However, plaintiffs' experts found that LIBOR was lower than the Fed Eurodollar Rate, and that individual defendants' LIBOR quotes were also lower than the Fed Eurodollar Rate, for most of the Class Period. OTC Am. Compl. ¶¶ 67-88. According to plaintiffs, this finding suggests not only that "suppression of LIBOR occurred during the Class Period," but also that defendants conspired to suppress LIBOR, as "[t]he sustained period during which the [Fed Eurodollar Rate] - LIBOR Spread fell and remained starkly negative . . . is not plausibly achievable absent collusion among Defendants." *Id.* ¶ 88.

In addition to the above statistical analysis, plaintiffs cite "publicly available analyses by academics and other commentators" which "collectively indicate ILBOR was artificially

suppressed during the Class Period." *Id.* ¶ 89. For instance, plaintiffs discuss studies that found "variance between [banks'] LIBOR quotes and their contemporaneous cost of buying default insurance . . . on debt they issued during [the Class Period]." *Id.* ¶ 90; *see also id.* ¶¶ 90-103. Plaintiffs also note commentators' findings that defendants' LIBOR quotes "demonstrated suspicious 'bunching' around the fourth lowest quote submitted by the 16 banks," which "suggests Defendants collectively depressed LIBOR by reporting the lowest possible rates that would not be excluded from the calculation of LIBOR on a given day. *Id.* ¶ 105; *see also id.* ¶¶ 105-13.

Plaintiffs further observe that "during 2008 and 2009 at least some of [defendants'] LIBOR quotes were too low in light of the dire financial circumstances the banks faced." *Id.* ¶ 128. For instance, the LIBOR submissions of Citigroup, RBS, and WestLB were suspiciously low given the financial troubles facing those banks during the Class Period. *Id.* ¶¶ 128-38.

Finally, plaintiffs allege that they were not aware of defendants' manipulation "until March 15, 2011, when UBS released its annual report 20-F stating that it had received subpoenas from the Department of Justice, the SEC, the CFTC, as well as an information request from the Japanese Financial Supervisory Agency, all relating to its interest rate submissions to the BBA." *Id.* ¶ 205. UBS had explained that these investigations addressed "whether there were improper attempts by UBS, either acting on its own or together with others, to manipulate LIBOR at certain times." Plaintiffs maintain that, even though several

news articles had warned as early as spring 2008 that LIBOR was suspiciously low,[3] these warnings did not provide notice of defendants' alleged manipulation of LIBOR because they were counteracted by public statements from the BBA and individual defendants that provided alternative explanations for why LIBOR had failed to track comparable benchmarks. *Id.* ¶¶ 192-204.

Following the filing of plaintiffs' amended complaints on April 30, 2012, several governmental agencies disclosed that they had reached settlements with Barclays with regards to Barclays' submission of artificial LIBOR quotes. Although plaintiffs were not able to incorporate information from these settlements into their amended complaints, they have submitted to the Court, in the course of opposing defendants' motions to dismiss, settlement documents issued by the Criminal Division of the Department of Justice, the Commodities Futures Trading Commission (the "CFTC"), and the United Kingdom Financial Services Authority (the "FSA"). See DOJ Statement; CFTC Settlement Order (June 27, 2012) [hereinafter CFTC Order], Ex. 4, Scherrer Decl.; FSA Final Notice (June 27, 2012), Ex. 5, Scherrer Decl. [hereinafter FSA Notice].

These agencies found that Barclays had engaged in "wrongful conduct spann[ing] from at least 2005

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[3] These articles will be discussed in detail below in the context of whether plaintiffs' commodities manipulation claims are time-barred.

through at least 2009," at times "on an almost daily basis." CFTC Order 2. Specifically:

> During the period from at least mid-2005 through the fall of 2007, and sporadically thereafter into 2009, Barclays based its LIBOR submissions for U.S. Dollar (and at limited times other currencies) on the requests of Barclays' swaps traders, including former Barclays swaps traders, who were attempting to affect the official published LIBOR, in order to benefit Barclays' derivatives trading positions; those positions included swaps and futures trading positions . . . .

Id. The agencies documented instances in which Barclays' LIBOR submitters had accommodated requests from traders for an artificially high LIBOR quote as well as instances where the LIBOR submitters had accommodated requests for an artificially low LIBOR quote. *See, e.g.*, *id.* at 7-11. In addition to this manipulation to benefit daily trading positions, leading to either an artificially high or artificially low LIBOR quote, the agencies found that from "late August 2007 through early 2009," Barclays's LIBOR submitters, "[p]ursuant to a directive by certain members of Barclays' senior management," consistently submitted artificially low LIBOR quotes "in order to manage what [Barclays] believed were inaccurate and negative public and media perceptions that Barclays had a liquidity problem." *Id.* at 3.

C. Plaintiffs' Alleged Injury

As discussed above, the present motions to dismiss apply to the amended complaints of four groups of

plaintiffs: the OTC, bondholder, exchange-based, and Schwab plaintiffs. Each of these groups alleges that it suffered a distinct injury as a result of defendants' alleged misconduct. We will address each group in turn.

1. OTC Plaintiffs

The lead OTC plaintiffs are the Mayor and City Council of Baltimore ("Baltimore") and the City of New Britain Firefighters' and Police Benefit Fund ("New Britain"). Baltimore "purchased hundreds of millions of dollars in interest rate swaps directly from at least one Defendant in which the rate of return was tied to LIBOR." OTC Am. Compl. ¶ 12. New Britain "purchased tens of millions of dollars in interest rate swaps directly from at least one Defendant in which the rate of return was tied to LIBOR." *Id.* ¶ 13. These plaintiffs seek to represent a class of "[a]ll persons or entities . . . that purchased in the United States, directly from a Defendant, a financial instrument that paid interest indexed to LIBOR . . . any time during the [Class Period]." *Id.* ¶ 34. According to plaintiffs, they suffered injury as a result of defendants' alleged misconduct because their financial instruments provided that they would receive payments based on LIBOR, and when defendants allegedly suppressed LIBOR, plaintiffs received lower payments from defendants. *See id.* ¶¶ 8, 219.

2. Bondholder Plaintiffs

The lead bondholder plaintiffs are Ellen Gelboim ("Gelboim") and Linda Zacher ("Zacher"). Gelboim "is the sole beneficiary of her Individual Retirement Account that during the Class Period owned a . . .

LIBOR-Based Debt Security issued by General Electric Capital Corporation." Bondholder Am. Compl. ¶ 15. Similarly, Zacher "is the sole beneficiary of her late husband's Individual Retirement Account that during the Class Period owned a . . . LIBOR-Based Debt Security issued by the State of Israel." *Id.* ¶ 16. These plaintiffs seek to represent the following class:

> [A]ll [persons] who owned (including beneficially in 'street name') any U.S. dollar-denominated debt security (a) that was assigned a unique identification number by the [Committee on Uniform Securities Identification Procedures] system; (b) on which interest was payable at any time [during the Class Period]; and (c) where that interest was payable at a rate expressly linked to the U.S. Dollar Libor rate.

Id. ¶ 1; *see also id.* ¶ 198. This class excludes holders of debt securities to the extent that their securities were "issued by any Defendant as obligor." *Id.* Plaintiffs allege that they suffered injury as a result of defendants' alleged misconduct because they "receiv[ed] manipulated and artificially depressed amounts of interest on [the] [d]ebt [s]ecurities they owned during the Class Period." *Id.* ¶ 14.

3. Exchange-Based Plaintiffs

In order to place the exchange-based plaintiffs' claims in context, we will first provide a brief overview of Eurodollar futures contracts. We will then summarize who plaintiffs are and how they allege they were injured.

a. Eurodollar Futures Contracts

A futures contract "is an agreement for the sale of a commodity on a specific date (the 'delivery date')." *In re Amaranth Natural Gas Commodities Litig.*, 269 F.R.D. 366, 372 (S.D.N.Y. 2010). The seller of a futures contract, known as the "short," agrees to deliver the commodity specified in the contract to the buyer, known as the "long," on the delivery date. *See id.* However, in most cases, the commodity never actually changes hands; rather, "[m]ost investors close out of their positions before the delivery dates," *id.*, such as by entering into offsetting contracts whereby the commodity delivery requirements cancel out and "[t]he difference between the initial purchase or sale price and the price of the offsetting transaction represents the realized profit or loss," Exchange Am. Compl. ¶ 208.

Although many futures contracts are based on an underlying commodity that is a physical good, such as copper, others are not. One such futures contract is a Eurodollar futures contract, which is "the most actively traded futures contract[] in the world." *Id.* ¶ 201; *see also* DOJ Statement 4 ("In 2009, according to the Futures Industry Association, more than 437 million Eurodollar futures contracts were traded . . . ."). Eurodollar futures contracts, traded on the Chicago Mercantile Exchange (the "CME"), Exchange Am. Compl. ¶ 201, are based on an "underlying instrument" of a "Eurodollar Time Deposit having a principal value of USD $1,000,000 with a three-month maturity." CME Group, *Eurodollar Futures: Contract Specifications*, http://www.cmegroup.com/trading/

interest-rates/stir/eurodollar_contract_specifications.html (last visited Mar. 29, 2013). "Eurodollars are U.S. dollars deposited in commercial banks outside the United States." CME Group, *Eurodollar Futures*, http://www.cmegroup.com/trading/interest-rates/files/IR148_Eurodollar_Futures_Fact_Card.pdf.

Eurodollar futures contracts do not require the seller actually to deliver cash deposits to the buyer, but rather provide that at the end of the contract, the "settlement date," the seller pays the buyer a specified price. The price at settlement "is equal to 100 minus the three-month Eurodollar interbank time deposit rate," which rate is defined as the USD three-month LIBOR fix on the contract's last trading day. CME Group, *Eurodollar Futures Final Settlement Procedure*, http://www.cmegroup.com/trading/interest-rates/files/final-settlement-procedure-eurodollar-futures.pdf. Like other futures contracts, Eurodollar futures contracts may be traded prior to settlement, and their trading price will reflect "the market's prediction of the [three]-month [USD] LIBOR on [the contract's last trading day]." DOJ Statement ¶ 9.

Finally, options on Eurodollar futures contracts are also traded on the CME. Exchange Am. Compl. ¶ 210. A trader might purchase a "call," which gives him "the right, but not the obligation, to buy the underlying Eurodollar futures contract at a certain price - the strike price." *Id.* A trader could also purchase a "put," giving him "the right, but not the obligation, to sell the underlying Eurodollar futures contract at the strike price." *Id.* The price at which a

Eurodollar option trades "is affected by the underlying price of the Eurodollar futures contract, which, in turn, is directly affected by the reported LIBOR." *Id.*

b. Plaintiffs and Their Alleged Injury

There are seven lead exchange-based plaintiffs. Plaintiff Metzler Investment GmbH ("Metzler") is a German company that launched and managed investment funds which traded Eurodollar futures. Exchange Am. Compl. ¶ 20. Plaintiffs FTC Futures Fund SICAV ("FTC SICAV") and FTC Futures Fund PCC Ltd. ("FTC PCC") are each funds, based in Luxembourg and Gibraltar, respectively, which traded Eurodollar futures. *Id.* ¶¶ 21-22. Plaintiffs Atlantic Trading USA, LLC ("Atlantic") and 303030 Trading LLC ("303030") are both Illinois limited liability companies with principal places of business in Illinois and which traded Eurodollar futures. *Id.* ¶¶ 23-24. Finally, plaintiffs Gary Francis ("Francis") and Nathanial Haynes ("Haynes") are both residents of Illinois who traded Eurodollar futures. *Id.* ¶¶ 25-26. These plaintiffs seek to represent a class of "all persons . . . that transacted in Eurodollar futures and options on Eurodollar futures on exchanges such as the CME [during the Class Period] and were harmed by Defendants' manipulation of LIBOR." *Id.* ¶ 221.

Plaintiffs allege that they suffered injury from defendants' alleged manipulation of LIBOR. According to plaintiffs, defendants' suppression of LIBOR caused Eurodollar contracts to trade and settle at artificially high prices. *Id.* ¶¶ 215-16. Plaintiffs purchased Eurodollar contracts during the Class Period, *id.* ¶ 214, and "the direct and foreseeable effect of the

Defendants' intentional understatements of their LIBOR rate was to cause Plaintiffs and the Class to pay supracompetitive prices for [their] CME Eurodollar futures contracts." *Id.* ¶ 217.

4. Schwab Plaintiffs

The last group of plaintiffs comprises the Schwab plaintiffs. As discussed above, these plaintiffs do not seek to represent a class, but rather have filed three separate amended complaints. First, the "Schwab Bank" amended complaint has three plaintiffs.[4] Plaintiff The Charles Schwab Corporation is a Delaware corporation with its principal place of business in California. Schwab Bank Am. Compl. ¶ 17. Plaintiff Charles Schwab Bank, N.A., is a national banking association which is a wholly-owned subsidiary of The Charles Schwab Corporation and is organized under the laws of Arizona, with its principal place of business in Nevada. *Id.* ¶ 18. Finally, Plaintiff Charles Schwab & Co., Inc., is a California corporation and a wholly owned subsidiary of The Charles Schwab Corporation, which through its division Charles Schwab Treasury, manages the investments of Charles Schwab Bank, N.A. *Id.* ¶ 19. Each of these plaintiffs "purchased or held LIBOR-based financial instruments during the [Class Period]." *Id.* ¶¶ 17-19.

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[4] The "Schwab Bank" action is *Charles Schwab Bank, N.A. v. Bank of America Corp.* (11 Civ. 6411).

Second, the "Schwab Bond" amended complaint also has three plaintiffs.[5] Plaintiff Schwab Short-Term Bond Market fund is "a series of Schwab Investments, an open-end, management investment company organized under Massachusetts law." Schwab Bond Am. Compl. ¶ 17. Plaintiff Schwab Total Bond Market Fund "is also a series of Schwab Investments." *Id.* ¶ 18. Finally, plaintiff Schwab U.S. Dollar Liquid Assets Fund is a fund managed in California and which is "a series of Charles Schwab Worldwide Funds plc, an investment company with variable capital, incorporated in Ireland." *Id.* ¶ 19. Each of these plaintiffs "purchased or held LIBOR-based financial instruments during the [Class Period]." *Id.* ¶¶ 17-19.

Third, the "Schwab Money" amended complaint has seven plaintiffs.[6] Plaintiff Schwab Money Market Fund is "a series of The Charles Schwab Family of Funds, an open-end investment management company organized as a Massachusetts business trust." Schwab Money Am. Compl. ¶ 17. Plaintiffs Schwab Value Advantage Money Fund, Schwab Retirement Advantage Money Fund, Schwab Investor Money Fund, Schwab Cash Reserves, and Schwab Advisor Cash Reserves are each also "a series of The Charles Schwab Family of Funds." *Id.* ¶¶ 18-22. Finally, Plaintiff Schwab YieldPlus Fund is "a series of Schwab

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[5] The "Schwab Bond" action is *Schwab Short-Term Bond Market Fund v. Bank of America Corp.* (11 Civ. 6409).

[6] The "Schwab Money" action is *Schwab Money Market Fund v. Bank of America Corp.* (11 Civ. 6412).

Investments, an open-end investment management company organized as a Massachusetts business trust." *Id.* ¶ 23. "Contingent interests of Schwab YieldPlus Fund have passed to Plaintiff Schwab YieldPlus Fund Liquidation Trust." *Id.* Each of these plaintiffs "purchased or held LIBOR-based financial instruments during the [Class Period]." *Id.* ¶¶ 17-23.

Plaintiffs argue that they were injured as a result of defendants' alleged suppression of LIBOR, which "artificially depress[ed] the value of tens of billions of dollars in LIBOR-based financial instruments the [plaintiffs] held or purchased." *Id.* ¶ 194. These financial instruments included floating-rate instruments paying a rate of return directly based on LIBOR, *id.* ¶ 195, and fixed-rate instruments which plaintiffs decided to purchase by comparing the instruments' fixed rate of return with LIBOR, *id.* ¶ 197. Plaintiffs purchased both floating- and fixed-rate instruments directly from defendants, from subsidiaries or other affiliates of defendants, and from third parties. *Id.* ¶¶ 196, 198-99.

III. Discussion

Under Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To avoid dismissal, a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Where plaintiffs have not "nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Id.* In applying this standard, a court must accept as true all

well-pleaded factual allegations and must draw all reasonable inferences in favor of the plaintiff. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam); *Kassner v. 2nd Ave. Delicatessen, Inc.*, 496 F.3d 229, 237 (2d Cir. 2007). The Court may also "properly consider 'matters of which judicial notice may be taken, or documents either in plaintiff['s] possession or of which plaintiff[] had knowledge and relied on in bringing suit.'" *Halebian v. Berv*, 644 F.3d 122, 130 n.7 (2d Cir. 2011) (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002)).

In the case at bar, defendants have moved to dismiss all of plaintiffs' claims. Our analysis will proceed in an order roughly based on the structure of the parties' briefing: (1) antitrust claims, (2) exchange-based claims, (3) RICO claim, and (4) state-law claims.

A. Antitrust Claim

Each amended complaint asserts a cause of action for violation of section 1 of the Sherman Act. OTC Am. Compl. ¶¶ 220-26; Bondholder Am. Compl. ¶¶ 205-11; Exchange Am. Compl. ¶¶ 245-49; Schwab Bond Am. Compl. ¶¶ 202-08; Schwab Bank Am. Compl. ¶¶ 201-07; Schwab Money Am. Compl. ¶¶ 214-20. The Schwab plaintiffs have also asserted a cause of action for violation of California's antitrust statute, the Cartwright Act. Schwab Bond Am. Compl. ¶¶ 239-45; Schwab Bank Am. Compl. ¶¶ 238-44; Schwab Money Am. Compl. ¶¶ 251-57. Defendants have moved to dismiss these claims on four grounds: (1) plaintiffs do not adequately plead a contract, combination, or conspiracy, (2) plaintiffs fail to allege a restraint of trade, (3) plaintiffs lack antitrust standing, and (4)

indirect purchasers lack standing under *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977). Because we find that the third ground, that plaintiffs lack antitrust standing, is a sufficient reason to dismiss plaintiffs' antitrust claims, we need not reach the remaining grounds.

Section 1 of the Sherman Act provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (2006). The private right of action to enforce this provision is established in section 4 of the Clayton Act:

> Except as provided in subsection (b) of this section [relating to the amount of damages recoverable by foreign states and instrumentalities of foreign states], any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Id. § 15. Here, plaintiffs claim that they were injured by defendants' alleged conspiracy in restraint of trade, in violation of section 1 of the Sherman Act, and accordingly bring suit pursuant to section 4 of the Clayton Act.

To have standing under the Clayton Act, a private plaintiff must demonstrate (1) antitrust injury, and (2) "that he is a proper plaintiff in light of four 'efficient enforcer' factors" derived from the Supreme Court's decision in *Associated General Contractors v. California State Council of Carpenters* ("*AGC*"), 459 U.S. 519 (1983). *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 688 (2d Cir. 2009). Here, plaintiffs have not plausibly alleged that they suffered antitrust injury, thus, on that basis alone, they lack standing. We need not reach the *AGC* "efficient enforcer" factors.

1. Antitrust Injury

a. Antitrust Injury Defined

As articulated by the Supreme Court in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) ("*ARCO*"), "antitrust injury" refers to injury "attributable to an anticompetitive aspect of the practice under scrutiny." *Id.*; *see also Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) ("Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation.").[7]

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[7] Here, plaintiffs have alleged that defendants violated the Sherman Act through a horizontal price-fixing conspiracy. The element of defendants' alleged price fixing which makes it unlawful, as with any conduct in violation of the antitrust laws, is

Although conduct in violation of the Sherman Act might reduce, increase, or be neutral with regard to competition, a private plaintiff can recover for such a violation only where "the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior." *ARCO*, 495 U.S. at 344 (emphasis in original). Moreover, it is not enough that defendant's conduct disrupted or distorted a competitive market: "Although all antitrust violations . . . 'distort' the market, not every loss stemming from a violation counts as antitrust injury." *Id.* at 339 n.8. Therefore, a plaintiff must demonstrate *not only* that it suffered injury and that the injury resulted from defendants' conduct, *but also* that the injury resulted from the anticompetitive nature of defendant's conduct. *See Nichols v. Mahoney*, 608 F. Supp. 2d 526, 543-44 (S.D.N.Y. 2009). The rationale, of course, is that the Clayton Act's rich bounty of treble damages and attorney's fees should reward only those plaintiffs who further the purposes of the Sherman and Clayton Acts, namely, "protecting competition." *Brooke Grp. Ltd. v.*

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its effect of restraining competition. See *Arizona v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 345 (1982) ("The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. . . . Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed . . . ." (quoting *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927))).

Brown & Williamson Tobacco Corp., 509 U.S. 209, 251 (1993).

b. A Per Se Violation of the Sherman Act Does Not Necessarily Establish Antitrust Injury

Critically, even when a plaintiff can successfully allege a per se violation of section 1 of the Sherman Act, such as horizontal price fixing, the plaintiff will not have standing under section 4 of the Clayton Act unless he can separately demonstrate antitrust injury. *See ARCO*, 495 U.S. at 344 ("[P]roof of a per se violation and of antitrust injury are distinct matters that must be shown independently." (quoting Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 334.2c, p. 330 (1989 Supp.))); *see also Paycom Billing Servs., Inc. v. Mastercard Int'l, Inc.*, 467 F.3d 283, 290 (2d Cir. 2006) ("Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." (quoting *Associated Gen. Contractors, Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 534 (1983)) (internal quotation marks omitted)). In other words, even though a defendant might have violated the Sherman Act and thus be subject to criminal liability, it is a separate question whether Congress intended to subject the defendant as well to civil liability, in particular to the plaintiffs suing.

c. California's Cartwright Act also Requires Antitrust Injury

The antitrust injury requirement also applies to claims pursuant to the Cartwright Act, Cal. Bus. & Prof. Code § 16700 et seq. (West 2012). *See Flagship Theatres of Palm Desert, LLC v. Century Theatres,*

Inc., 198 Cal. App. 4th 1366, 1378, 1380 (App. 2d Dist. 2011) ("[F]ederal case law makes clear that the antitrust injury requirement also applies to other federal antitrust violations [beyond anticompetitive mergers]. California case law holds that the requirement applies to Cartwright Act claims as well. . . . [T]he antitrust injury requirement means that an antitrust plaintiff must show that it was injured by the anticompetitive aspects or effects of the defendant's conduct, as opposed to being injured by the conduct's neutral or even procompetitive aspects."); *Morrison v. Viacom, Inc.*, 66 Cal. App. 4th 534, 548 (App. 1st Dist. 1998) ("The plaintiff in a Cartwright Act proceeding must show that an antitrust violation was the proximate cause of his injuries. . . . An 'antitrust injury' must be proved; that is, the type of injury the antitrust laws were intended to prevent, and which flows from the invidious conduct which renders defendants' acts unlawful." (alteration in original) (quoting *Kolling v. Dow Jones & Co.*, 137 Cal. App. 3d 709, 723 (App. 1st Dist. 1982))); *id.* ("Appellants failed to allege antitrust injury . . . because they have failed to allege any facts to show they suffered an injury which was caused by restraints on competition."). The common antitrust injury requirement derives from the Cartwright Act's and Sherman Act's common purpose. *See Exxon Corp. v. Superior Court*, 51 Cal. App. 4th 1672, 1680 (App. 6th Dist. 1997) (citations omitted) ("The Cartwright Act, as the Sherman Antitrust Act, was enacted to promote free market competition and to prevent conspiracies or agreements in restraint or monopolization of trade.").

2. Defendants' Alleged Conduct Was Not Anticompetitive

a. The LIBOR-Setting Process Was Never Competitive

Here, plaintiffs do not argue that the collaborative LIBOR-setting process itself violates the antitrust laws, but rather that defendants violated the antitrust laws by conspiring to set LIBOR at an artificial level. *See, e.g.*, OTC Compl. ¶¶ 217-26. According to plaintiffs:

> Defendants' anticompetitive conduct had severe adverse consequences on competition in that [plaintiffs] who traded in LIBOR-Based [financial instruments] during the Class Period were trading at artificially determined prices that were made artificial as a result of Defendants' unlawful conduct. As a consequence thereof, [plaintiffs] suffered financial losses and were, therefore, injured in their business or property.

Id. ¶ 219; *see also* Tr. 17-18.[8]

Although these allegations might suggest that defendants fixed prices and thereby harmed plaintiffs, they do not suggest that the harm plaintiffs suffered resulted from any anticompetitive aspect of defendants' conduct. As plaintiffs rightly acknowledged at oral argument, the process of setting

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[8] References preceded by "Tr." refer to the transcript of the oral argument held on March 5, 2013.

LIBOR was never intended to be competitive. Tr. 12, 18. Rather, it was a cooperative endeavor wherein otherwise-competing banks agreed to submit estimates of their borrowing costs to the BBA each day to facilitate the BBA's calculation of an interest rate index. Thus, even if we were to credit plaintiffs' allegations that defendants subverted this cooperative process by conspiring to submit artificial estimates instead of estimates made in good faith, it would not follow that plaintiffs have suffered antitrust injury. Plaintiffs' injury would have resulted from defendants' misrepresentation, not from harm to competition.

b. Plaintiffs Do Not Allege a Restraint on Competition in the Market for LIBOR-Based Financial Instruments

It is of no avail to plaintiffs that defendants were competitors outside the BBA. Tr. 29-30. Although there might have been antitrust injury if defendants had restrained competition in the market for LIBOR-based financial instruments or the underlying market for interbank loans, plaintiffs have not alleged any such restraint on competition.

First, with regard to the market for LIBOR-based financial instruments, plaintiffs have not alleged that defendants' alleged fixing of LIBOR caused any harm to competition between sellers of those instruments or between buyers of those instruments. Plaintiffs' allegation that the prices of LIBOR-based financial instruments "were affected by Defendants' unlawful behavior," such that "Plaintiffs paid more or received less than they would have in a market free from Defendants' collusion," Antitrust Opp'n 36, might

support an allegation of price fixing but does not indicate that plaintiffs' injury resulted from an anticompetitive aspect of defendants' conduct.[9] In

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[9] Contra to plaintiffs' argument, the Ninth Circuit's decision in *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979 (9th Cir. 2000), is not to the contrary. *Knevelbaard Dairies* involved a claim by plaintiff milk producers that defendant cheese makers had conspired to fix a low price for bulk cheese, thereby depressing the price defendants paid plaintiffs for milk because California regulators used the bulk cheese price to set the minimum milk price. Plaintiffs had argued that defendants "did not compete," but rather "collusively manipulate[ed] [bulk cheese] prices to levels lower than would prevail under conditions of free and open competition." *Id. at 984*. The Ninth Circuit held that plaintiffs had adequately alleged antitrust injury. As quoted by plaintiffs, the Court reasoned:

> Since the plaintiffs allegedly were subjected to artificially depressed milk prices, the injury flows "from that which makes the conduct unlawful," i.e., from the collusive price manipulation itself. . . . When horizontal price fixing causes buyers to pay more, or sellers to receive less, than the prices that would prevail in a market free of the unlawful trade restraint, antitrust injury occurs.

Antitrust Opp'n 37 (quoting *Knevelbaard Dairies*, 232 F.3d at 987-88). However, in the context of the claims before it, the Ninth Circuit clearly intended to refer to collusive price manipulation *in place of competition*, and its reference to paying more or receiving less than the prices that would prevail in a market free of the unlawful trade restraint clearly contrasted prices in a market with such a restraint to a market operating under free competition. Moreover, the Ninth Circuit explicitly recognized that "the central purpose of the antitrust laws, state and federal, is to preserve competition, " *Knevelbaard Dairies*, 232 F.3d at 988, and it quoted a leading antitrust treatise for the proposition that the harm to sellers from a price-fixing conspiracy by buyers

other words, it is not sufficient that plaintiffs paid higher prices because of defendants' collusion; that collusion must have been anticompetitive, involving a failure of defendants to compete where they otherwise would have. Yet here, undoubtedly as distinguished from most antitrust scenarios, the alleged collusion occurred in an arena in which defendants never did and never were intended to compete.

c. Plaintiffs Do Not Allege a Restraint on Competition in the Interbank Loan Market

Second, there was similarly no harm to competition in the interbank loan market. As discussed above, LIBOR is an index intended to convey information about the interest rates prevailing in the London interbank loan market, but it does not necessarily correspond to the interest rate charged for any actual interbank loan. Plaintiffs have not alleged that defendants fixed prices or otherwise restrained competition in the interbank loan market, and likewise have not alleged that any such restraint on competition caused them injury. Plaintiff's theory is that defendants competed normally in the interbank loan market and then agreed to lie about the interest rates they were paying in that market when they were

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"constitutes antitrust injury, for it reflects the rationale for condemning buying cartels – namely, *suppression of competition* among buyers, reduced upstream and downstream output, and distortion of prices," *id.* (quoting 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 375b at 297 (rev. ed. 1995)) (emphasis added).

called upon to truthfully report their expected borrowing costs to the BBA. This theory is one of misrepresentation, and possibly of fraud, but not of failure to compete.

3. Plaintiffs Could Have Suffered the Harm Alleged Here Under Normal Circumstances

The above analysis is confirmed by inquiring, as courts previously have in evaluating antitrust injury, whether plaintiff could have suffered the same harm under normal circumstances of free competition. For example, in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), defendant was a manufacturer of bowling equipment that had purchased financially distressed bowling centers. Plaintiffs, operators of other bowling centers, brought suit against defendant pursuant to the Clayton Act, arguing that they had lost future income because the distressed bowling centers purchased by defendant would otherwise have gone bankrupt. The Supreme Court held that these allegations did not establish antitrust injury. Although defendants' actions might have violated the Sherman Act by bringing "a 'deep pocket' parent into a market of 'pygmies,'" plaintiffs did not suffer antitrust injury because their alleged harm bore "no relationship to the size of either the acquiring company or its competitors." *Id.* at 487. Plaintiffs "would have suffered the identical 'loss' but no compensable injury had the acquired centers instead obtained refinancing or been purchased by 'shallow pocket' parents." *Id.* Therefore, even if respondents were injured, "it was not 'by reason of anything forbidden in the antitrust laws': while

respondents' loss occurred 'by reason of' the unlawful acquisitions, it did not occur 'by reason of' that which made the acquisitions unlawful." *Id.* at 488.

In *ARCO*, the Court reaffirmed this approach in the context of price fixing. Defendant in that case was an integrated oil company that marketed gasoline both directly through its own stations and indirectly through dealers operating under its brand name. Facing competition from independent "discount" gas dealers, such as those operated by plaintiff, defendant allegedly conspired with its dealers to implement a vertical, maximum-price-fixing scheme. *ARCO*, 495 U.S. at 331-2. Many independent gas dealers could not compete with the below-market prices established by this scheme, and consequently went out of business.

Despite the harm that defendant's conspiratorial conduct had caused plaintiff, the Supreme Court held that plaintiff had not suffered antitrust injury. The Court reasoned that a competitor could establish antitrust injury only by demonstrating predatory pricing, that is, pricing below cost in order to drive competitors out of business:

> When a firm, or even a group of firms adhering to a vertical agreement, lowers prices but maintains them above predatory levels, the business lost by rivals cannot be viewed as an "anticompetitive" consequence of the claimed violation. A firm complaining about the harm it suffers from nonpredatory price competition "is really claiming that it [is] unable to raise prices." Blair & Harrison, *Rethinking Antitrust Injury*, 42 Vand. L. Rev. 1539, 1554 (1989). This

> is not antitrust injury; indeed, "cutting prices in order to increase business often is the very essence of competition." [*Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986)].

Id. at 337-38 (footnote omitted). In other words, cutting prices to a level still above cost is not merely consistent with competition - something that could be expected to occur under normal circumstances – but indeed is often "the very essence of competition" - something to be desired. Because the harm plaintiffs suffered resulted from competitive, healthy conduct, it did not constitute antitrust injury.

As with the harm alleged in *Brunswick* and *ARCO*, the harm alleged here could have resulted from normal competitive conduct. Specifically, the injury plaintiffs suffered from defendants' alleged conspiracy to suppress LIBOR is the same as the injury they would have suffered had each defendant decided independently to misrepresent its borrowing costs to the BBA. Even if such independent misreporting would have been fraudulent, it would not have been anticompetitive, and indeed would have been consistent with normal commercial incentives facing defendants. Those incentives, of course, are alleged on the face of plaintiffs' complaints: defendants allegedly had incentive (1) "to portray themselves as economically healthier than they actually were" and (2) "to pay lower interest rates on LIBOR-based financial instruments that Defendants sold to investors." OTC Compl. ¶ 5.

In this respect, the present case contrasts with more traditional antitrust conspiracies, such as a conspiracy among sellers to raise prices. Whereas in such a scenario, the sellers' supracompetitive prices could exist only where the sellers conspired not to compete, here, each defendant, acting independently, could rationally have submitted false LIBOR quotes to the BBA. The reason why it would have been sustainable for each defendant individually to submit an artificial LIBOR quote is that, as discussed above, the LIBOR submission process is not competitive. A misreporting bank, therefore, would not have been concerned about being forced out of business by competition from other banks. In other words, precisely because the process of setting LIBOR is not competitive, collusion among defendants would not have allowed them to do anything that they could not have done otherwise.

This analysis would not change if we were to accept plaintiffs' argument that defendants could not, absent collusion, have submitted the "clustered" rates that they submitted during the Class Period. The question is not whether defendants could have submitted independently the exact quotes that they in fact submitted, but rather whether they could have caused plaintiffs the same injury had they acted independently. As discussed above, the answer is yes: each defendant could have submitted, independently, a LIBOR quote that was artificially low. Further, whether the quotes would have formed a "cluster" or

not is irrelevant: plaintiffs' injury resulted not from the clustering of LIBOR quotes, but rather from the quotes' alleged suppression.[10] In short, just as the bowling center operators in *Brunswick* could have suffered the same injury had the failing bowling centers remained open for legitimate reasons, and just as the gas dealers in *ARCO* could have suffered the same injury had defendant's prices been set through normal competition, the plaintiffs here could have suffered the same injury had each bank decided independently to submit an artificially low LIBOR quote.

Moreover, *Brunswick* and *ARCO*, which each held that plaintiffs did not suffer antitrust injury, involved more harm to competition than was present here. In *Brunswick*, defendant's conduct brought "a 'deep pocket' parent into a market of 'pygmies,'" altering the positions of competitors in the bowling center market in a manner that was potentially harmful to competition. In *ARCO*, similarly, the prices set by defendants' conspiracy displaced prices set through free competition and thereby gave defendants' dealers a competitive advantage over other dealers in the retail gas market. Here, by contrast, there is no allegation of harm to competition. For one, LIBOR was

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[10] Indeed, given that a bank's LIBOR quote represents the bank's expectation of its own costs of borrowing, and that different banks based in different countries could sensibly face significantly different borrowing costs, it would not be surprising for banks to submit LIBOR quotes that differed persistently over the course of several years.

never set through competition, even under normal circumstances. While it is true that the prices of LIBOR-based financial instruments are set through competition, and that a change in LIBOR may have altered the baseline from which market actors competed to set the price of LIBOR-based instruments, competition proceeded unabated and plaintiffs have alleged no sense in which it was displaced.

Additionally, there is no allegation that defendants' conduct changed their position vis-à-vis their competitors. At any given time, there is only one LIBOR, used by all actors throughout the relevant market. Although defendants' alleged manipulation of the level of LIBOR might have had the distributive effect of transferring wealth between the buyers and sellers of LIBOR-based financial instruments, including between defendants and their customers, plaintiffs have not alleged any structural effect wherein defendants improved their position relative to their competitors. Because *Brunswick* and *ARCO* each involved more harm to competition than was present here, yet the Supreme Court held in each case that plaintiff had not suffered antitrust injury, it is even clearer here that antitrust injury does not exist.

4. Plaintiffs' "Proxy" Argument Is Unavailing

At oral argument, plaintiffs contended that LIBOR is a proxy for competition in the underlying market for interbank loans, and thus defendants effectively harmed competition by manipulating LIBOR. According to plaintiffs, when defendants reported artificial LIBOR quotes to the BBA, they "snuff[ed] out . . . the proxy for competition" by

"interdicting the competitive forces that set [defendants'] rates" and otherwise would have affected LIBOR and the price of LIBOR-based instruments. Tr. 24, 27. This argument was advanced in the context of Eurodollar futures contracts, which are based on the underlying market for interbank loans, but it also applies to other LIBOR-based financial instruments. If LIBOR "interdict[ed]" competition that would otherwise have affected the market for Eurodollar futures contracts, it equally interdicted competition that would have affected the market for LIBOR-based financial instruments more broadly.

Although there is a sense in which this argument accurately characterizes the facts, the argument does not demonstrate that plaintiffs suffered antitrust injury. It is true that LIBOR is a proxy for the interbank lending market; indeed, it is precisely because LIBOR was thought to accurately represent prevailing interest rates in that market that it was so widely utilized as a benchmark in financial instruments. It is also true that if LIBOR was set at an artificial level, it no longer reflected competition in the market for interbank loans and its value as a proxy for that competition was diminished, even "snuffed out." However, the fact remains that competition in the interbank lending market and in the market for LIBOR-based financial instruments proceeded unimpaired. If LIBOR no longer painted an accurate picture of the interbank lending market, the injury plaintiffs suffered derived from misrepresentation, not from harm to competition.

Contrary to plaintiffs' contention, Tr. 28, their "proxy" argument does not derive support from the line of cases finding an antitrust violation where a defendant manipulated one component of a price, both because those cases do not involve a proxy for competition and because they are distinguishable. Plaintiffs cite *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980), in which the Supreme Court held that beer wholesalers violated the Sherman Act by conspiring to discontinue a previously common practice of extending short-term interest-free credit to retailers. However, not only did *Catalano* not involve a proxy for competition, but it also is plainly distinguishable: whereas the beer wholesalers in *Catalano* had previously competed over the credit terms they offered to retailers, such that the conspiracy to fix credit terms displaced an arena of competition, here there was never competition over LIBOR - a rate that, at any given time, is necessarily uniform throughout the market - and thus defendants' alleged conspiracy to fix LIBOR did not displace competition.

Plaintiffs also cite *In re Yarn Processing Patent Validity Litigation*, 541 F.2d 1127 (5th Cir. 1976), in which the Fifth Circuit considered a scheme whereby a manufacturer of yarn processing machines which also owned the patent in those machines conspired with other manufacturers to split the royalty income the patent holder received equally among all of the manufacturers. The Court held that the scheme violated the antitrust laws because it fixed a portion of the prices that manufacturers received for the machines - prices over which the manufacturers

competed. *Id.* Here, by contrast, the LIBOR-based financial instruments that defendants competed to sell had always contained LIBOR, a value uniform throughout the market, and thus defendants' conduct did not displace competition where it normally would have occurred.

Finally, plaintiffs cite *Northwestern Fruit Co. v. A. Levy & J. Zentner Co.*, 665 F. Supp. 869 (E.D. Cal. 1986), which considered a claim by cantaloupe purchasers that cantaloupe sellers had conspired to fix the cooling and palletizing charge added to the price of cantaloupe. The Court held that the conspiracy violated the antitrust laws, even if cantaloupe sellers continued to compete on the underlying price, because fixing even a component of price is unlawful. *Id.* at 872. Our case is plainly distinguishable because the price of LIBOR-based financial instruments had always contained a "fixed" component - LIBOR - and thus defendants' alleged conspiracy, as discussed above, did not displace competition.

5. Plaintiffs' Remaining Cases Are Distinguishable

The other cases plaintiffs put forward as addressing arguably similar facts are also distinguishable because they involve harm to competition which is not present here. To begin, plaintiffs read *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), as establishing that "plaintiffs who lost business due to defendants' manipulation of a standard-setting process with persuasive influence on marketplace transactions were entitled to Sherman Act relief." Antitrust Opp'n 37.

However, not only did *Allied Tube* not rule on antitrust injury or liability, addressing instead the single question of whether defendants were immune from antitrust liability under *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *see Allied Tube*, 486 U.S. 492, but to whatever extent it might provide persuasive authority regarding antitrust injury, it is distinguishable. In *Allied Tube*, a manufacturer of plastic electrical conduit sued a manufacturer of steel conduit that had conspired with other members of a trade association to exclude plastic conduit from the association's safety standard, which standard was widely incorporated into local government regulations. *Allied Tube*, 486 U.S. at 495-96. Like the LIBOR-setting process, the process of forming the safety standard was a cooperative endeavor by otherwise-competing companies under the auspices of a trade association. Critically, however, whereas the conspiracy in *Allied Tube* gave defendants a competitive advantage over plaintiff by shutting plaintiff's product out of the industry safety standard, here plaintiffs have not alleged that defendants' suppression of LIBOR gave them an advantage over their competitors.

Each of the other decisions plaintiffs cite involving defendants' failure to provide accurate information also involved a harm to competition beyond what is present here. See *F.T.C. v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986) (dentists agreed not to submit x-rays to dental insurance companies, where dentists would otherwise have competed over their degree of cooperation with insurance companies); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978)

(trade association of engineers adopted rule prohibiting the discussion of costs until the client had selected an engineer, thus prohibiting competitive bidding among engineers); *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971) (defendant oil producers submitted artificially low sales forecasts to state regulator in order to lower the total production limit in an oil field in which both plaintiffs and defendants operated, where the regulator's formula for allotting production allowables favored plaintiffs and thus a decrease in the total production limit disproportionately harmed plaintiffs).

Similarly, plaintiffs' "list price" cases are distinguishable. For instance, the Ninth Circuit in *Plymouth Dealers' Ass'n of N. Cal. v. United States*, 279 F.2d 128 (9th Cir. 1960), considered a conspiracy among Plymouth car dealers to fix the list prices for cars and accessories. The Court held that the conspiracy violated the Sherman Act, despite the fact that dealers were free to bargain down from the list price. *Id.* Here, plaintiffs would have us follow similar reasoning, but the defect in the comparison is that list prices are a very different sort of benchmark than LIBOR. The Plymouth dealers' conspiracy to fix list prices "established as a matter of actual practice one boundary of 'the range within which . . . sales would be made,'" thus "prevent[ing] the determination of (market) prices by free competition alone." *Id.* at 134 (quoting *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222-23 (1940)). By contrast, the price of LIBOR-based financial instruments can be set at any level above or below LIBOR, and thus defendants'

alleged conspiracy to fix LIBOR did not constrain the free and competitive bargaining of actors in the market for LIBOR-based financial instruments.

Finally, plaintiffs' cases involving manipulation of indices are distinguishable for the same reason. Plaintiffs cite *In re Rail Freight Fuel Surcharge Antitrust Litigation*, 587 F. Supp. 2d 27, 593 F. Supp. 2d 29 (D.D.C. 2008), which addressed a conspiracy by major railroads to remove fuel costs from a cost escalation index that was published by a trade association and widely used in rail freight transportation contracts, and instead to implement a uniform fuel surcharge. The Court held that plaintiffs had established antitrust injury: "through their allegations identifying defendants' supracompetitive prices, plaintiffs here have alleged an injury to competition itself." 593 F. Supp. 2d at 42. Importantly, though, the Court clarified that defendants' collaboration in the industry association to publish the new cost escalation index was not necessarily anticompetitive by itself, but rather was anticompetitive when combined with defendants' other actions, notably imposing the uniform fuel surcharge. 587 F. Supp. 2d at 35. In our case, although defendants allegedly fixed a benchmark, LIBOR, published by a trade association, the BBA, they did not add a uniform charge, like the fuel surcharge in *Rail Freight*, to an otherwise competitively determined price. The other decisions cited by plaintiffs that found antitrust injury where defendants manipulated an index are also distinguishable because they each involved a failure of defendants to compete. *See, e.g.*, *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979

(9th Cir. 2000) (defendants failed to compete in the bulk cheese market and thus manipulated the government-mandated minimum price for milk, which was calculated using a formula that incorporated the price of bulk cheese); *Ice Cream Liquidation, Inc. v. Land O'Lakes, Inc.*, 253 F. Supp. 2d 262 (D. Conn. 2003) (same, except defendants failed to compete in the butter market, which also affected a minimum milk price).

6. Conclusion

For these reasons, plaintiffs' allegations do not make out a plausible argument that they suffered an antitrust injury. Plaintiffs, therefore, do not have standing to bring claims pursuant to the Clayton Act or the Cartwright Act.[11] Accordingly, plaintiffs' antitrust claims are dismissed.

B. Exchange-Based Claims

The Exchange-Based Plaintiffs have asserted causes of action for manipulation of Eurodollar futures in violation of the Commodity Exchange Act ("CEA"), 7 U.S.C. §§ 1-25 (2006), and vicarious liability for and aiding and abetting such manipulation. Exchange Am. Compl. ¶¶ 228-44. Defendants have moved to dismiss these claims on three grounds: (1) the claims involve an impermissible extraterritorial application of the CEA, (2) the claims are time-barred, and (3) plaintiffs fail to state a claim for manipulation under the CEA.

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[11] As discussed below, we assert supplemental jurisdiction over plaintiffs' Cartwright Act claim.

For the reasons stated below, we find that, although plaintiffs' claims do not require an extraterritorial application of the CEA and do not fail to plead commodities manipulation, they are time-barred at least to the extent that they rely on contracts purchased from August 2007, the start of the Class Period, through May 29, 2008, the date by which plaintiffs were clearly on inquiry notice of their injury.

1. Extraterritoriality

Defendants first argue that plaintiffs' claims must be dismissed because the CEA does not apply extraterritorially, yet plaintiffs' claims rely exclusively on foreign commodities manipulation. As discussed below, although we agree that the CEA does not apply extraterritorially, we find that the alleged manipulation nonetheless falls within the CEA's purview.

a. Legal Standard

Both sides agree that *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), governs the question of whether plaintiffs' claims involve an impermissibly extraterritorial application of the CEA. Tr. 35; Exchange MTD 13-17. In Morrison, the Supreme Court reaffirmed the "longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." Morrison, 130 S. Ct. at 2877 (quoting *EEOC v. Arabian Am. Oil Co.* ("*Aramco*"), 499 U.S. 244, 248 (1991)) (internal quotation marks omitted). The Court observed that this principle is not a limit on Congress's authority to legislate, but rather "represents a canon

of construction . . . [that] rests on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters." *Id.*

The Court established a two-part test for deciding questions of extraterritoriality. First, "'unless there is the affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect, 'we must presume it is primarily concerned with domestic conditions.'" *Id.* (quoting *Aramco*, 499 U.S. at 248). "When a statute gives no clear indication of an extraterritorial application, it has none." *Id.* at 2878. Second, if a statute applies only domestically, a court must determine which domestic conduct the statute regulates. The reason for this inquiry is that "it is a rare case of prohibited extraterritorial application that lacks all contact with the territory of the United States," and thus the presumption against extraterritoriality, to have any meaning, must limit the statute's application to those domestic activities that "are the objects of the statute's solicitude," that "the statute seeks to 'regulate.'" *Id.* at 2884. To carry out this analysis, a court must ascertain "the 'focus' of congressional concern." *Id.* (quoting *Aramco*, 499 U.S. at 255).

Applying this framework to section 9(a) of the CEA, the provision under which plaintiffs assert their claims, we first observe that "neither the CEA nor its legislative history specifically authorizes extraterritorial application of the statute." *CFTC v. Garofalo*, 10 CV 2417, at *11 (N.D. Ill. Dec. 21, 2010) (citing *Tamari v. Bache & Co.*, 730 F.2d 1103, 1107 (7th Cir. 1984)). Rather, "the statute is silent on this

issue and shows neither a Congressional intent to apply the CEA to foreign agents nor a wish to restrict the statute to domestic activities." *Id.* (citing *Tamari*, 730 F.2d at 1107). Indeed, there is even less of an indication of extraterritorial application here than in section 10(b) of the Securities and Exchange Act of 1934 (the "'34 Act"), 15 U.S.C. §§ 78a-78pp (2006 & Supp. IV 2010), as amended by the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of the U.S. Code), which the *Morrison* Court held did not apply extraterritorially. The Court reasoned in *Morrison* that even though one of section 10(b)'s terms, "interstate commerce," was defined to include foreign commerce, *see* 15 U.S.C. § 78c(a)(17), "[t]he general reference to foreign commerce in the definition of 'interstate commerce' does not defeat the presumption against extraterritoriality." *Morrison*, 130 S. Ct. at 2882. Here, "interstate commerce," as referenced in section 9(a) of the CEA, 7 U.S.C. § 13(a)(2), does not even include a reference to foreign commerce, *id.* § 1a(30). Because section 9(a) of the CEA "gives no clear indication of an extraterritorial application, it has none." *Morrison*, 130 S. Ct. at 2878.

Having concluded that section 9(a) of the CEA applies only domestically, we must still determine which domestic activities "are the objects of the statute's solicitude," which activities "the statute seeks to 'regulate.'" *Id.* at 2884. We therefore must determine "the 'focus' of congressional concern" in enacting section 9(a) of the CEA. *Id.* (quoting *Aramco*, 499 U.S. at 255).

Section 9(a) makes it a crime for "[a]ny person to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity." 7 U.S.C. § 13(a)(2). This provision clearly focuses on commodities in interstate commerce and futures contracts traded on domestic exchanges. Such an interpretation of the statute's focus is consistent with the CEA's statement of purpose, *see* 7 U.S.C. § 5(b), as well as decisions interpreting the CEA, *see, e.g. Tamari v. Bache & Co.*, 730 F.2d 1103, 1108 (7th Cir. 1984) ("[T]he fundamental purpose of the [CEA] is to ensure the integrity of the domestic commodity markets."); *cf. CFTC v. Garofalo*, 10 CV 2417, at *12 (ruling that sections 6c(a) and (b) of the CEA, prohibiting certain transactions in commodities future or option contracts, "are concerned with where the underlying options contracts were actually traded"). Accordingly, a claim is within the CEA's domestic application if it involves (1) commodities in interstate commerce or (2) futures contracts traded on domestic exchanges.

b. The Present Allegations

Here, plaintiffs' claims plainly involve futures contracts traded on domestic exchanges. By manipulating LIBOR, defendants allegedly manipulated the price of Eurodollar futures contracts, which is directly based on LIBOR. Eurodollar futures contracts, of course, are traded on the *Chicago* Mercantile Exchange. Indeed, defendants acknowledged at oral argument that Eurodollar futures contracts are within the scope of the CEA's

manipulation provision. Tr. 42. Because plaintiffs' claims involve manipulation of the price of domestically traded futures contracts, they are not impermissibly extraterritorial.

According to defendants, plaintiffs "don't allege that the defendants . . . manipulated the futures contract with Chicago," but rather allege only that defendants manipulated the Eurodollar contract's underlying commodity. *Id.* at 43. Defendants contend that "[t]here are all kinds of things one can do to manipulate futures contracts," but "[n]ot one of those things is alleged here." *Id.*

We do not concur. LIBOR was directly incorporated into the *price* of Eurodollar futures contracts, and by allegedly manipulating LIBOR, defendants manipulated the price of those contracts. Moreover, as discussed further below, LIBOR cannot plausibly be understood as the commodity underlying Eurodollar futures contracts; the only plausible way to characterize the components of a Eurodollar contract is that the underlying commodity is a USD 1,000,000 deposit in a foreign commercial bank with a three-month maturity, and the price is settled or traded at a value based on LIBOR. This understanding of Eurodollar futures contracts limits which claims have been adequately pleaded, but it also forecloses defendants' argument that the only thing plaintiffs have alleged is manipulation of Eurodollar contracts' underlying commodity. In short, plaintiffs' claims clearly involve manipulation of the price of Eurodollar futures contracts, and manipulating the price of futures contracts traded on domestic exchanges is

precisely the conduct that the CEA was designed to regulate. Accordingly, plaintiffs' claims fall within the purview of the CEA.

2. Statute of Limitations

Defendants next argue that plaintiffs' claims are barred by the CEA's statute of limitations. As discussed below, we find that certain of plaintiffs' claims are barred, certain are not, and others may or may not be, though we will not dismiss them at this stage.

a. Legal Standard

A claim pursuant to the CEA must be brought "not later than two years after the date the cause of action arises." 7 U.S.C. § 25(c). The CEA does not elaborate, however, on the circumstances that start the running of its statute of limitations. Where a federal statute "is silent on the issue" of when a cause of action accrues, as the CEA is, courts apply a "discovery accrual rule" wherein "discovery of the injury, not discovery of the other elements of a claim, is what starts the clock." *Koch v. Christie's Int'l PLC*, 699 F.3d 141, 148-49 (2d Cir. 2012) (quoting *Rotella v. Wood*, 528 U.S. 549, 555 (2000)) (internal quotation marks omitted) (interpreting the statute of limitations for RICO claims, which requires plaintiffs to bring suit no later than "[four] years after the cause of action accrues," 28 U.S.C. § 1658(a)); *see also Premium Plus Partners, L.P. v. Goldman, Sachs & Co.*, 648 F.3d 533, 536 (7th Cir. 2011) (Easterbrook, C.J.) ("Section 25(c) of the Commodity Exchange Act . . . says that suit must be filed within two years of 'the date the cause of action arises.' We have understood this to mean the date on

which the investor discovers that he has been injured.").

Under Second Circuit precedent, courts apply an "inquiry notice" analysis to determine when a plaintiff has discovered his injury:

> Inquiry notice - often called "storm warnings" in the securities context - gives rise to a duty of inquiry "when the circumstances would suggest to an investor of ordinary intelligence the probability that she has been defrauded." In such circumstances, the imputation of knowledge will be timed in one of two ways: (i) "[i]f the investor makes no inquiry once the duty arises, knowledge will be imputed as of the date the duty arose"; and (ii) if some inquiry is made, "we will impute knowledge of what an investor in the exercise of reasonable diligence[] should have discovered concerning the fraud, and in such cases the limitations period begins to run from the date such inquiry should have revealed the fraud."

Koch, 699 F.3d at 151 (quoting *Lentell v. Merrill Lynch & Co.*, 396 F.3d 161, 168 (2d Cir. 2005)); *see also id.* at 153 ("[O]nce there are sufficient 'storm warnings' to trigger the duty to inquire, and the duty arises, if a plaintiff does not inquire within the limitations period, the claim will be time-barred."). In short, we first ask at what point the circumstances were such that they "would suggest to [a person] of ordinary intelligence the probability that she has been defrauded." *Id.* at 151 (internal quotation marks omitted). If plaintiffs do not then inquire within two years, they are deemed to

have knowledge of their injury at the point at which the duty to inquire arose, and the period of limitations starts to run on that date. Here, plaintiffs do not allege that they made any inquiry into their injury prior to March 15, 2011. *See* Exchange Am. Compl. ¶¶ 182-99. Thus, if circumstances would have suggested to a person of ordinary intelligence the probability that he had been defrauded more than two years prior to March 15, 2011, that is, prior to March 15, 2009, then, to the extent plaintiffs' claims are based on Eurodollar contracts purchased through the date of inquiry notice, the claims are barred by the statute of limitations.

Contrary to plaintiffs' contention, the amount of public information necessary to start the period of limitations for commodities manipulation under the CEA is significantly less than the amount necessary to commence the period of limitations for securities fraud under the '34 Act. The two-year limitations period for securities fraud begins to run upon "the discovery of the facts constituting the violation." 28 U.S.C. § 1658(b)(1) (2006). In *Merck & Co., Inc. v. Reynolds*, 559 U.S. 633 (2010), the Supreme Court held that "the 'facts constituting the violation' include the fact of scienter, 'a mental state embracing intent to deceive, manipulate, or defraud.'" *Id.* at 1790 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n.12 (1976)). The Court reasoned: "[T]his 'fact' of scienter 'constitut[es]' an important and necessary element of a § 10(b) 'violation.' A plaintiff cannot recover without proving that a defendant made a material misstatement with an intent to deceive – not merely innocently or negligently." *Id.* at 1796 (emphasis omitted). According to the Second Circuit, this analysis

indicates that the Court "thought about the requirements for 'discovering' a fact in terms of what was required to adequately plead that fact and survive a motion to dismiss." *City of Pontiac Gen. Emps.' Ret. Sys. v. MBIA, Inc.*, 637 F.3d 169, 175 (2d Cir. 2011).

Plaintiffs argue that this pleading-based standard applies here, such that the statute of limitations did not begin to run until they could have adequately pleaded a claim for commodities manipulation. Exchange Opp'n 24-26. In support of this argument, plaintiffs rely on language in *City of Pontiac* in which the Circuit, considering "the basic purpose of a statute of limitations," reasoned that because the purpose is to prevent plaintiffs from unfairly surprising defendants by bringing stale claims, and because a claim cannot be stale until it has "accrued," a statute of limitations cannot commence until a claim has "accrued." *City of Pontiac*, 637 F.3d at 175; *see also* Exchange Opp'n 25. Further, "[o]nly after a plaintiff can adequately plead his claim can that claim be said to have accrued." *City of Pontiac*, 637 F.3d at 175. Plaintiffs argue that this language applies to statutes of limitations generally, including in the CEA context.

However, despite this general discussion of the purposes of statutes of limitations, the fact remains that City of Pontiac interpreted only the statute of limitations of the '34 Act, which is different on its face than the statute of limitations of the CEA. In *Koch v. Christie's Int'l PLC*, 699 F.3d 141 (2d Cir. 2012), the Circuit confirmed that the analysis in *Merck*, which was the basis for the pleading-based standard established in *City of Pontiac*, "does not apply outside

the realm of the statute that it interpreted." *Id.* at 150; *see also Premium Plus Partners, L.P. v. Goldman, Sachs & Co.*, 648 F.3d 533, 536 (7th Cir. 2011) (Easterbrook, C.J.) ("The language of [the '34 Act's statute of limitations] . . . is hard to impute to [the CEA's statute of limitations."). "It remains the law in this Circuit that a RICO claim accrues upon the discovery of the injury alone." *Koch*, 699 F.3d at 150. As discussed above, the CEA, like RICO, is silent regarding when a cause of action arises. Therefore, the Second Circuit's holding in *Koch* that the RICO statute of limitations is based on a "discovery of the injury" standard is controlling in the context of the CEA.

Moreover, the pleading-based standard applicable to securities fraud claims is instructive here to the extent that it sets an upper bound on the amount of information necessary to commence the period of limitation for plaintiffs' commodities manipulation claims. As discussed below, a plaintiff seeking damages for commodities manipulation must satisfy the following four elements: "(1) that [defendant] had the ability to influence market prices; (2) that [he] specifically intended to do so; (3) that artificial prices existed; and (4) that the [defendant] caused the artificial prices." *DiPlacido v. CFTC*, 364 F. App'x 657, 661 (2d Cir. 2009) (quoting *In re Cox*, No. 75-16, 1987 WL 106879, at *3 (C.F.T.C. July 15, 1987)). In order for the period of limitations to commence, however, a plaintiff need not be able to make such a showing. In particular, plaintiffs here did not need to be able to allege "that Defendants were knowingly colluding to suppress LIBOR." Exchange Am. Compl. ¶ 197 (emphasis omitted). Rather, it was necessary only that

"circumstances would [have] suggest[ed] to [a person] of ordinary intelligence the probability that she ha[d] been defrauded." *Koch*, 699 F.3d at 151 (quoting *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 168 (2d Cir. 2005)). Specifically, plaintiffs here would have been on inquiry notice of their injury if circumstances would have suggested to a person of ordinary intelligence the probability that the LIBOR fixes which affected the prices of plaintiffs' Eurodollar contracts had been manipulated. If inquiry notice was triggered on a date prior to March 15, 2009, plaintiffs' claims based on Eurodollar futures contracts purchased through the date of inquiry notice are barred.

Finally, we are mindful that "defendants bear a heavy burden in establishing that the plaintiff was on inquiry notice as a matter of law." *Newman v. Warnaco Grp., Inc.*, 335 F.3d 187, 194-95 (2d Cir. 2003) (quoting *Nivram Corp. v. Harcourt Brace Jovanovich, Inc.*, 840 F. Supp. 243, 249 (S.D.N.Y. 1993)). Nonetheless, "[d]ismissal is appropriate when the facts from which knowledge may be imputed are clear from the pleadings and the public disclosures themselves." *In re Ultrafem Inc. Sec. Litig.*, 91 F. Supp. 2d 678, 692 (S.D.N.Y. 2000).

b. Publicly Available Information Relating to LIBOR Manipulation

By May 29, 2008, seven articles published in prominent national news sources, along with one report referenced in several of those articles, suggested that LIBOR had been at artificial levels since August 2007, the start of the Class Period. As discussed below,

these articles put plaintiffs on inquiry notice of their claims based on Eurodollar futures contracts purchased during that period.[12]

On April 10, 2008, Citigroup strategists Scott Peng, Chintan Gandhi, and Alexander Tyo published a research report entitled, "Special Topic: Is LIBOR Broken?" (the "Peng Report"). Scott Peng et al., Citigroup, *Special Topic: Is LIBOR Broken?*, Apr. 10, 2008. The Report found that "[three-month] LIBOR probably understates real interbank lending costs by 20-30 [basis points]."[13] *Id.* To support this determination, the Report compared LIBOR with the three-month Eurodollar deposit rate calculated by the Federal Reserve. "Because the Fed's data are based on the bid-side rate of interbank borrowing, the Fed's Eurodollar rate should be less than LIBOR (which, by definition, is an offered rate)." *Id.* Yet, the Report observed, "the Fed's bid-side rate is now 29 [basis points] higher than LIBOR's offered-side rate," and had generally been higher than LIBOR since August 2007. *Id.* This made "no economic sense." *Id.* The Report concluded that the Federal Reserve Eurodollar deposit rate, which seemed reasonable, "may be a

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[12] Plaintiffs argue in their opposition brief that the Barclays settlement documents suggest LIBOR manipulation extending as far back as 2005, and that they should, accordingly, be granted leave to amend their complaint to include allegations based on information derived from the Barclays settlements. Exchange Opp'n 29-30. As discussed below, we will grant plaintiffs leave to move to amend their complaints to include such allegations.

[13] One basis point is one-hundredth of a percentage point.

better gauge than LIBOR of short-term funding levels." *Id.*

The Report also compared one-month LIBOR to the rate at which the Federal Reserve auctioned off collateralized shortterm loans to banks under a program known as the Term Auction Facility ("TAF"). TAF loans had recently been auctioned at a rate higher than LIBOR, though "[g]iven that the TAF is a securitized borrowing rate as opposed to LIBOR, which is an unsecuritized lending rate, it seem[ed] counterintuitive for banks to pay a higher interest rate to borrow from the TAF than to borrow from the interbank market." *Id.* Something was off, and because the TAF rate appeared "entirely normal," the Report concluded that "the real issue lies in a much bigger arena - LIBOR." *Id.* The Report observed that a likely explanation for the unusual LIBOR rates was that banks were seeking to bolster the market's perception of their financial health: "[A]ny bank posting a high LIBOR level runs the risk of being perceived as needing funding. With markets in such a fragile state, this kind of perception could have dangerous consequences." *Id.*

According to a Bloomberg article published on May 18, 2009, the Peng Report "brought widespread attention to the possibility [that LIBOR] might be understating actual bank lending costs." Liz Capo McCormick, *Citigroup's Head of Rates Strategy, Scott Peng, Leaves Firm*, Bloomberg.com, May 18, 2009.

On April 16, 2008, the *Wall Street Journal* published an article entitled, "Bankers Cast Doubt on Key Rate amid Crisis." Carrick Mollenkamp, *Bankers*

Cast Doubt on Key Rate amid Crisis, Wall St. J., Apr. 16, 2008. The article commenced by explicitly observing that LIBOR might be inaccurate: "One of the most important barometers of the world's financial health could be sending false signals. In a development that has implications for borrowers everywhere, . . . bankers and traders are expressing concerns that the London inter-bank offered rate, known as Libor, is becoming unreliable." *Id.* As evidence that LIBOR was diverging from its "true" level, the article included a graph comparing three-month LIBOR to the three-month Federal Reserve Eurodollar deposit rate, with the heading "Broken Indicator?" and the caption "Since the financial crisis began, the rate on three-month interbank loans has diverged at times from the comparable rate for dollars deposited outside the U.S." *Id.* The article also discussed the Peng Report, noting that the Report had "compare[ed] Libor with [the TAF] indicator and others - such as the rate on three-month bank deposits known as the Eurodollar rate" to conclude that "Libor may be understated by 0.2 to 0.3 percentage points." *Id.*

The article suggested that banks had several incentives to underreport LIBOR, notably the same incentives now alleged by plaintiffs: "Some banks don't want to report the high rates they're paying for short-term loans because they don't want to tip off the market that they're desperate for cash," and "banks might have an incentive to provide false rates to profit from derivatives transactions." *Id.* Finally, the article reported that the BBA was investigating the LIBOR submission process in response to concerns from "bankers and other market participants," and that,

"[i]n one sign of increasing concern about Libor, traders and banks are considering using other benchmarks to calculate interest rates." *Id.*

The next day, on April 17, 2008, the *Wall Street Journal* published another article raising questions about LIBOR's accuracy. Carrick Mollenkamp & Laurence Norman, *British Bankers Group Steps up Review of Widely Used Libor*, Wall St. J., Apr. 17, 2008. The article reported that the BBA, "[f]acing increasing questions about the reliability of [LIBOR]," had "fast-tracked an inquiry into the accuracy of the rate" and declared that "if banks are found to have submitted inaccurate figures, they would be removed from the panels that submit rates." *Id.* According to the article, "the credit crisis," commonly understood to have begun in August 2007, *see* Peng Report, "ha[d] highlighted gaps between Libor and other interest rates, and it ha[d] raised questions about whether banks are submitting rates that accurately reflect actual borrowing costs," Mollenkamp & Norman, *supra*. Bankers and traders "ha[d] expressed concerns that some banks don't want to report the high rate they are paying for fear of creating the impression they are desperate for cash." *Id.* Significantly, "[t]he problems with Libor ha[d] also been a hot topic among traders in the market for Eurodollar futures." *Id.*

On April 18, 2008, the *Wall Street Journal* published its third article in as many days regarding questions over LIBOR. Carrick Mollenkamp, *Libor Surges After Scrutiny Does, Too*, Wall St. J., Apr. 18, 2008. The article observed that after the BBA announced on April 16, 2008, that it would fast-track

its review of the LIBOR submission process, three-month USD LIBOR increased the next day by over eight basis points - "its largest jump since the advent of the credit crisis." *Id.* The increase, according to the article, might have been "a sign that banks could be responding to increasing concerns that the rate doesn't reflect their actual borrowing costs." *Id.* The article repeated the observations of the previous two that the BBA's move "came amid concerns among bankers that their rivals were not reporting the high rates they were paying for short-term loans for fear of appearing desperate for cash." *Id.* Additionally, the article noted the belief of some analysts that LIBOR had still not fully corrected: a strategist at Credit Suisse believed that three-month USD LIBOR was too low by 40 basis points, while the Peng Report had found LIBOR to be low by up to 30 basis points. *Id.*

On April 21, 2008, the *Financial Times* published an article entitled, "Doubts over Libor Widen." Gillian Tett & Michael Mackenzie, *Doubts over Libor Widen*, Fin. Times, Apr. 21, 2008. The article reported that "the credibility of Libor as a measure [was] declining," though this was "not entirely new: as the Financial Times first revealed [in 2007], bankers ha[d] been questioning the way Libor is compiled ever since the credit turmoil first erupted." *Id.* Regarding why LIBOR "ha[d] started to lag other, traded measures of market stress, such as the funding trends in the dollar deposit market," the article reported that although bankers thought it unlikely that there was collusion to suppress LIBOR, "there [was] a widespread belief that some banks ha[d] an incentive to keep their bids low." *Id.* Indeed, even though LIBOR is inherently a matter

of guesswork, especially when interbank lending is at a depressed level, the article quoted an economist's observation that "'[i]t is not surprising that [the LIBOR panel banks] make guesses that avoid unwelcome publicity.'" *Id.*

The next month brought three additional articles on the questions surrounding LIBOR. On May 16, 2008, Reuters published an article providing background on the issue and summarizing various suggestions regarding how best to move forward. *European, U.S. Bankers Work on Libor Problems*, Reuters, May 16, 2008. The article noted that "[t]hreats from the BBA in late April to expel any bank found acting improperly was the trigger for a surge in the daily fix[es] over the next couple of days." *Id.* Further, the article reported "worries that some banks were understating how much they had to pay to borrow money in order to avoid being labeled desperate for cash and, as a result, vulnerable to solvency rumors." *Id.*

On May 29, 2008, Bloomberg published an article that quoted a Barclays strategist's statement that "[b]anks routinely misstated borrowing costs to the [BBA] to avoid the perception they faced difficulty raising funds as credit markets seized up." Gavin Finch & Elliott Gotkine, *Libor Banks Misstated Rates, Bond at Barclays Says*, Bloomberg.com, May 29, 2008. The article also reported that LIBOR "show[ed] little correlation to banks' cost of insuring debt from default," despite the fact that, because lending rates and the cost of default insurance are both theoretically based on a bank's likelihood of defaulting on its debts,

they should be correlated. *Id.* As an example, the article observed that, over the period from July 2, 2007, through April 15, 2008, UBS's default insurance costs rose over 900 percent, while its USD LIBOR quotes "were lower than its rivals on 85 percent of the days during that period." *Id.* Finally, the article noted the unusual jump in three-month USD LIBOR after the BBA's April 16, 2008, announcement, and that traders had been "resorting to alternative measures for borrowing costs as the BBA struggle[d] to maintain Libor's status." *Id.* Indeed, trading in Eurodollar futures declined by 7.5 percent from March to April 2008, while trading in alternative future contracts experienced significant increases. *Id.*

Also on May 29, 2008, the *Wall Street Journal* reported the findings of a study on LIBOR that the newspaper had conducted. Carrick Mollenkamp & Mark Whitehouse, *Study Casts Doubt on Key Rate*, Wall St. J., May 29, 2008. The *Journal*'s analysis, based on data from January 23, 2008, through April 16, 2008, "indicate[d] that Citigroup Inc., WestLB, HBOS PLC, J.P. Morgan Chase & Co. and UBS AG [were] among the banks that ha[d] been reporting significantly lower borrowing costs for [LIBOR] than what another market measure suggest[ed] they should [have been]." *Id.* Over the period analyzed by the study, LIBOR and the cost of bank default insurance had diverged, "with reported Libor rates failing to reflect rising default-insurance costs." *Id.* Specifically, "the three-month and six-month dollar Libor rates were about a quarter percentage point [i.e. 25 basis points] lower than the borrowing rates suggested by the default-insurance market." *Id.* The *Journal*'s

methodology and findings were reviewed by "three independent academics," each of whom "said the approach was a reasonable way to analyze Libor." *Id.* Indeed, one reviewer stated that "the [*Journal*'s] calculations show 'very convincingly' that reported Libor rates are lower than what the market thinks they should be." *Id.*

The article also suggested that LIBOR was at an artificial level both before and after the study period. At a November 2007 meeting of a Bank of England money-market committee, concerns had emerged that "Libor wasn't high enough." *Id.* In late April 2008, moreover, after banks had reacted to the BBA's announcement, LIBOR remained 15 basis points too low. *Id.*

The article included the caveat that "[t]he Journal's analysis doesn't prove that banks are lying or manipulating Libor," given other possible explanations for the observed data, such as the guesswork inherent in calculating LIBOR and the fact that certain banks "have ample customer deposits and access to loans from the Federal Reserve." *Id.* Nonetheless, the article noted that "[i]f any bank submits a much higher rate than its peers, it risks looking like it's in financial trouble[, s]o banks have an incentive to play it safe by reporting something similar." *Id.* Indeed, a Stanford finance professor had determined that the observed three-month USD LIBOR quotes were "'far too similar to be believed,'" a conclusion buttressed by the fact that "[a]t times, banks reported similar borrowing rates even when the default-insurance market was drawing big distinctions

about their financial health." *Id.* The article concluded by observing that some traders had "beg[un] thinking about using other benchmarks," such as "the federal-funds rate - the rate at which banks loan to each other overnight." *Id.*

These articles are summarized in Figure 1, below.

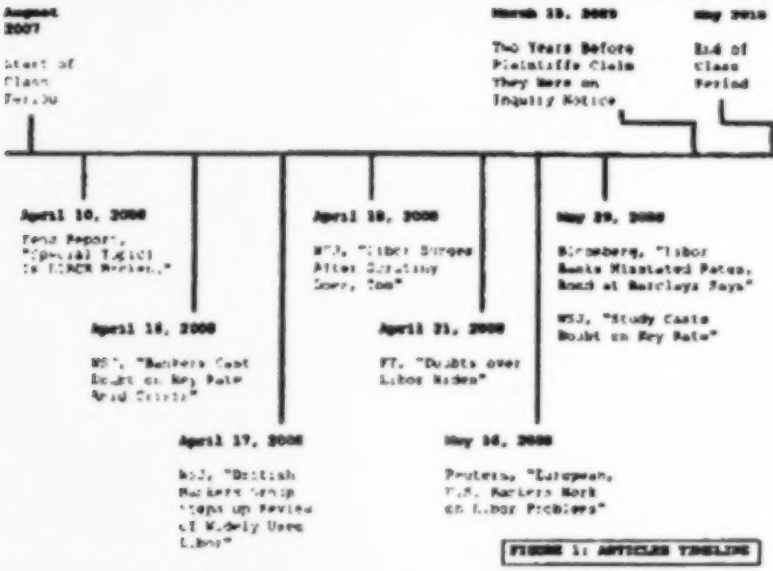

FIGURE 1: ARTICLES TIMELINE

c. Inquiry Notice

Plaintiffs argue that despite all of these articles, they were not on inquiry notice until March 15, 2011, "when UBS released its annual report 20-F stating that it had received subpoenas from the Department of Justice, the SEC, the CFTC, as well as an information request from the Japanese Financial Supervisory Agency, all relating to its interest rate submissions to the BBA." OTC Am. Compl. ¶ 205; *see also* Exchange Am. Compl. ¶¶ 197-98; Exchange Opp'n 24-30. Plaintiffs offer three reasons for why the articles published in April and May 2008 failed to put them on inquiry notice: the articles "[1] did nothing more than speculate about possible LIBOR discrepancies, [2] did not even suggest that such discrepancies resulted from

Defendants' intentional manipulation of their LIBOR submissions, and [3] were accompanied by denials from the BBA that the panel banks['] submissions represented anything other than their true borrowing costs." Exchange Opp'n 26.

These arguments are unconvincing. First, although it is accurate that none of the articles definitively established that LIBOR was being manipulated, they did not need to do so to place plaintiffs on inquiry notice. Rather, they needed only to suggest to a person of ordinary intelligence the probability that LIBOR had been manipulated. Accepting as true plaintiffs' allegations that they were injured by paying too high a price for Eurodollar futures contracts and that the price at which Eurodollar contracts trade is affected by existing LIBOR fixes, Exchange Am. Compl. ¶¶ 209-17, it follows that if plaintiffs were on notice that LIBOR had been set at artificial levels, they were also on notice of their injury. As discussed above, the Peng Report and the seven articles published in the ensuing weeks reported that (1) since August 2007, LIBOR had diverged from benchmarks with which it should have been correlated, (2) independent experts had confirmed this comparative methodology and concluded that LIBOR was too low, (3) the BBA had accelerated its review of the LIBOR submissions process and publicly declared that a bank submitting false rates would be disqualified from the LIBOR panel, (4) LIBOR quotes jumped abnormally on the day following the BBA's announcement, and (5) market actors had begun to shift away from LIBOR-based instruments toward instruments based on

alternative benchmarks because of their distrust of recent LIBOR fixes. Faced with this information, and especially in light of the fact that it was reported by five separate institutions, a person of ordinary intelligence would clearly have been on notice that LIBOR was probably being set at artificial levels and, consequently, that Eurodollar futures contract prices had also been artificial.

Second, contrary to plaintiffs' argument, plaintiffs need not have been aware that the artificiality in LIBOR fixes "resulted from Defendants' intentional manipulation of their LIBOR submissions." Exchange Opp'n 26. Unlike inquiry notice under the '34 Act, which requires plaintiffs to be able to plead a claim for securities fraud, including scienter, inquiry notice under the CEA requires only that plaintiffs be on inquiry notice of their injury. In other words, plaintiffs need not have known that the artificial LIBOR levels resulted from intentional conduct by defendants; it is sufficient that plaintiffs knew that the LIBOR quotes defendants submitted did not reflect their actual expected borrowing rates, and thus that the prices of plaintiffs' Eurodollar contracts, based on LIBOR, were artificial. For the reasons stated above, plaintiffs clearly had such knowledge.

Finally, the fact that defendants and the BBA consistently denied that LIBOR fixes were artificial does not necessarily defeat inquiry notice. "[R]eassuring statements will prevent the emergence of a duty to inquire or dissipate such a duty only if an investor of ordinary intelligence would reasonably rely on the statements to allay the investor's concern." *LC*

Capital Partners, LP v. Frontier Ins. Grp., Inc., 318 F.3d 148, 155 (2d Cir. 2003); *see also In re Ambac Fin. Group, Inc. Sec. Litig.*, 693 F. Supp. 2d 241, 276 (S.D.N.Y. 2010).

Here, plaintiffs could not have reasonably relied on the reassurances of defendants and the BBA. A person of ordinary intelligence would have understood that defendants each had a strong incentive to portray themselves as truthful and that the BBA had a strong incentive to maintain market confidence in LIBOR's integrity. This is not to say that plaintiffs could never have reasonably relied on assurances by defendants and the BBA, but rather that they should have been cautious about accepting such assurances. As discussed above, repeated news reports provided evidence that LIBOR was being fixed at artificial levels. Additionally, each defendant's LIBOR quotes, as well as comparable benchmarks, were available every business day, such that plaintiffs could feasibly have investigated LIBOR's accuracy. Therefore, defendants' and the BBA's assurances that all was well with LIBOR could not have been reasonably relied on by plaintiffs and thus do not excuse plaintiffs' failure to inquire.

The cases cited by plaintiffs are not on point. First, this case is distinguishable from *Staehr v. Hartford Financial Services Group, Inc.*, 547 F.3d 406 (2d Cir. 2008). In *Staehr*, investors sued an insurance company in which they had purchased stock, alleging that they had purchased at inflated prices because they were unaware that the company's strong financial performance was actually the result of paying

unlawful kickbacks to insurance brokers. The Circuit held that the investors were not placed on inquiry notice by newspaper articles which, like the articles held not to trigger inquiry notice in *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161 (2d Cir. 2005), reported generally on "structural conflicts in [the insurance] industry" but did not contain information specific to the company at issue. *Staehr*, 547 F.3d at 429. Indeed, one article's failure to provide specific information was "a particularly important omission, since the writer acknowledged that not all insurers paid [kickbacks] to get business." *Id.* at 419. The Court distinguished *Shah v. Meeker*, 435 F.3d 244 (2d Cir. 2006), which held that plaintiff was placed on inquiry notice by an article in *Fortune* magazine that included a "specific description of the business practices *at the defendant company* . . . which served as the basis of the plaintiff's complaint against *that company*." *Staehr*, 547 F.3d at 430 (citing *Shah*, 435 F.3d at 251).

Here, the notice afforded plaintiffs more resembles that in *Shah* than it does the notice in *Staehr* and *Lentell*. To start, *Staehr* established a "sliding scale in assessing whether inquiry notice was triggered by information in the public domain: the more widespread and prominent the public information disclosing the facts underlying the fraud, the more accessible this information is to plaintiffs, and the less company-specific the information must be." *Id.* at 432. Here, the articles providing evidence that LIBOR was artificial were reported in "widespread and prominent" sources, such as the *Wall Street Journal* and the *Financial Times*, and were presented in an accessible fashion, explaining their conclusions in clear English that a

person of ordinary intelligence, without technical training, could understand. The required degree of specificity is therefore diminished.

In any event, the Peng Report and ensuing articles are sufficiently specific because they gave notice that plaintiffs had likely paid artificially high prices for their Eurodollar contracts. The specificity required to trigger inquiry notice is not necessarily specificity with regard to defendant, but rather specificity that notifies a plaintiff that he has been injured. For instance, the newspaper articles in *Staehr* failed to provide notice because they did not inform plaintiffs that the particular company plaintiffs had invested in had perpetrated an unlawful kickback scheme, and the articles in *Lentell* failed to provide notice because they did not inform plaintiffs that the particular research reports that plaintiffs had relied on were fraudulent. Here, by contrast, even though the Peng Report and ensuing articles mostly focused on LIBOR itself rather than the individual quotes of the panel banks,[14]

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[14] That said, the May 29, 2008, *Wall Street Journal* article presenting the Journal's analysis of LIBOR did single out the submissions of individual panel banks. In its second paragraph, it reported: "The Journal analysis indicates that Citigroup Inc., WestLB, HBOS PLC, J.P. Morgan Chase & Co. and UBS AG are among the banks that have been reporting significantly lower borrowing costs for [LIBOR] than what another market measure suggests they should be." Mollenkamp & Whitehouse, *supra*. Additionally, it included a chart that presented, for each USD LIBOR panel bank, "[t]he difference between banks' reported borrowing rates [i.e. LIBOR quotes] and rates computed by The

plaintiffs were on notice that LIBOR had likely been suppressed and thus that the prices of Eurodollar contracts, including the contracts plaintiffs had purchased, were artificial. Therefore, like in *Shah* and unlike in *Staehr* and *Lentell*, the published articles were sufficient to place plaintiffs on inquiry notice of their injury.

Additionally, to whatever extent plaintiffs needed notice of who was responsible for their injury, such notice existed. It was a matter of public knowledge which banks were on the USD LIBOR panel, what rate those banks submitted to the BBA each day, and how the final LIBOR fix was determined. Plaintiffs, that is, knew which banks affected the final LIBOR fixes and precisely how they affected those fixes.[15] Especially given that LIBOR is an average of the eight middle quotes, thus insulated to some extent from outlier

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Wall Street Journal, using information from the default-insurance market." *Id.*

[15] Although, on any given day, only the middle eight quotes would be included in the computation to determine the LIBOR fix, all of the submitted quotes "affected" the ultimate fix. For example, if a bank's "true" LIBOR quote would have been the tenth highest, within the middle eight, but the bank submitted instead an artificially low quote that was the fourteenth highest, outside the middle eight, the bank's quote would not be included in the computation to determine the LIBOR fix. Nonetheless, the quote would have affected the fix by "bumping up" the quote that would have been in the thirteenth highest spot, excluded from the calculation, into the twelfth highest spot, included in the calculation. Thus, on any given day, every LIBOR quote had some "effect" on the ultimate LIBOR fix.

quotes from individual banks, the fact that LIBOR persisted at a level that was likely artificial should have raised serious doubts about all panel banks' submissions. Moreover, it would have been feasible to investigate each bank's submissions: plaintiffs could have compared the submissions to the bank's cost of default insurance - a comparison that, to some extent, had already been performed and published in the May 29, 2008, *Wall Street Journal* article. *See* Mollenkamp & Whitehouse, *supra*. The notice here is thus stronger than when articles merely report general structural issues in an industry or particular unlawful acts by other companies within defendant's industry. Because the Peng Report and the articles published in April and May 2008 indicated that LIBOR was likely artificial, and LIBOR is affected by the actions of each of the panel banks, plaintiffs had sufficient notice of who was responsible for their injury, to whatever extent this is necessary.

For similar reasons, this case is unlike *In re Copper Antitrust Litigation*, 436 F.3d 782 (7th Cir. 2006). There, the Seventh Circuit held, in the antitrust context, that although copper purchasers were on inquiry notice that they had been injured by one defendant, a trading company that allegedly fixed the price of copper, there was insufficient publicly available information to notify the purchasers that their injury was attributable as well to another defendant, a bank that had provided loans to the trading company. In light of the Second Circuit decisions discussed above, holding that inquiry notice is triggered when the plaintiff discovers his injury, it is not clear that the Second Circuit would follow the

Seventh Circuit in finding no inquiry notice with respect to a defendant when a plaintiff had discovered his injury but not that the particular defendant was responsible. In any event, even if inquiry notice required plaintiffs to know who was responsible for their injury, the requirement would still be satisfied, for the reasons discussed above.

Plaintiffs also cite *Anderson v. Dairy Farmers of America, Inc.*, Civil No. 08-4726 (JRT/FLN), 2010 WL 1286181 (D. Minn. Mar. 29, 2010). In that case, a trader in milk futures sued a dairy marketing cooperative, alleging that the cooperative had purchased substantial quantities of cheese on the spot market not for normal business purposes, but rather to inflate artificially the price of milk futures, which incorporated the price of cheese. The Court found that the trader's knowledge of the cooperative's cheese purchases was insufficient to trigger inquiry notice, given that those purchases could have been justified by legitimate commercial reasons. The cooperative's purchases would constitute manipulation under the CEA only if there was "'something more,' some additional factor that cause[d] the dissemination of false or misleading information." *Id.* at *6 (quoting *In re Amaranth Natural Gas Commodities Litig.*, 587 F. Supp. 2d 513, 534 (S.D.N.Y. 2008)) (internal quotation marks omitted). Under the circumstances, the question of when the trader was on inquiry notice turned on when he "knew or should have known of [the cooperative]'s alleged intent to cause artificial cheddar cheese and [milk] futures prices." *Id.*

Anderson is plainly distinguishable. Whereas the cooperative's cheese purchases might have been legitimate, depending on the purpose they were intended to further, the present defendants' alleged submission of artificial LIBOR quotes was necessarily illegitimate, regardless of defendants' motives. In other words, although purchasing large quantities of cheese is not inherently improper, submitting artificial LIBOR quotes is. Therefore, plaintiffs' knowledge that LIBOR was likely artificial was sufficient to place plaintiffs on inquiry notice of their injury.

More broadly, our case is distinguishable from those in which the information necessary to place plaintiffs on inquiry notice of their injury is solely in the control of the defendants. Here, not only were LIBOR and each bank's LIBOR submission publicly available on a daily basis, but benchmarks of general interest rates and each bank's financial health were also publicly available, and the Peng Report and the *Wall Street Journal* analysis compared the *LIBOR* fixes and quotes to these benchmarks to conclude that LIBOR was likely artificial. In other words, by May 29, 2008, plaintiffs' investigative work had already been done for them and had been published in the pages of the *Wall Street Journal*.

Relatedly, we cannot credit plaintiffs' argument that they were not on inquiry notice because their complaint rests on analyses created only after tremendous effort by "world-class financial and statistical experts." Exchange Opp'n 28. As discussed above, by May 29, 2008, several sophisticated analyses comparing LIBOR to relevant benchmarks had already

been conducted, and their results were published in a plain-English format accessible to a person of "ordinary intelligence." Moreover, the conclusions of these analyses were supported by other reported evidence, such as the BBA announcement, the subsequent jump in LIBOR, and the decision by market actors to switch from LIBOR-based instruments to instruments based on more reliable indices. Thus, although plaintiffs are correct that the standard is not what would place an expert on notice but rather what would place a person of ordinary intelligence on notice, the fact is that a person of ordinary intelligence reading the information available as of May 29, 2008, would have been on notice of his injury.

Finally, plaintiffs argue that "the statute of limitations cannot bar CEA claims based on the conduct relating to the trading scheme described in Barclays settlements made public on June 27, 2012 and not alleged in the Exchange Complaint." *Id.* 29. The reason, according to plaintiffs, is that, "prior to June 27, 2012, there was not a single public article or news report even hinting at this day-to-day opportunistic manipulation of LIBOR to benefit Barclays' and other banks' traders, or that this misconduct began as early as 2005." *Id.*; *see also* CFTC Order 2 ("The wrongful conduct spanned from at least 2005 through at least 2009, and at times occurred on an almost daily basis."). Plaintiffs request that they "be permitted to amend the complaint to include these allegations." Exchange Opp'n 30.

As discussed below, we are inclined to believe that at least some potential claims based on day-to-day, trading-motivated manipulation are not time-barred. Therefore, we will grant plaintiffs leave to move to amend their complaint to include allegations based on information derived from the Barclays settlements, such motion to be accompanied by a proposed second amended complaint. However, if plaintiffs pursue such a motion, they should respond to the following concerns.

As we see it, the question of whether plaintiffs' potential claims based on day-to-day manipulation are time-barred presents two issues: (1) whether the period of limitations has expired on potential claims based on contracts purchased *prior* to August 2007, the start of the Class Period alleged in plaintiffs' amended complaint, and (2) whether the period of limitations has expired on potential claims based on contracts purchased *after* August 2007, given that the articles discussed above did not suggest the sort of manipulation alleged in the Barclays settlement papers.

With regard to the first issue, we are inclined to believe that plaintiffs' potential claims based on contracts purchased prior to August 2007 are not time-barred. Although the articles discussed above suggested that LIBOR was fixed at artificial levels starting in August 2007, they did not suggest artificiality in LIBOR levels prior to that time. Especially given that August 2007 is commonly recognized as the start of the financial crisis, and that banks' incentive to manipulate LIBOR, as reported in

the articles, was related to that crisis, a person of ordinary intelligence could reasonably have thought that LIBOR manipulation started in August 2007, but no earlier. Therefore, it seems that the articles discussed above did not place plaintiffs on inquiry notice of their injury based on contracts purchased prior to August 2007; indeed, plaintiffs might not have been on inquiry notice of their injury until the Barclays settlements were made public on June 27, 2012, after plaintiffs' amended complaint was filed. Consequently, plaintiffs' potential claims based on this conduct are probably not time-barred. Although we expect that claims based on contracts purchased prior to August 2007 will face even greater challenges with regard to loss causation than plaintiffs' other claims face, plaintiffs should have an opportunity to supplement their complaint with these allegations and to squarely address the issues those allegations raise.

By contrast, with regard to the second issue, we are inclined to think that the articles discussed above placed plaintiffs on inquiry notice of their injury based on any sort of LIBOR manipulation, including both the persistent suppression alleged in plaintiffs' amended complaint and the day-to-day manipulation for trading advantage suggested by the Barclays settlements. As discussed below, plaintiffs can recover for their claims only to the extent that they suffered "actual damages" from defendants' conduct. 7 U.S.C. § 25(a)(1). Plaintiffs could have suffered actual damages only if the price of their Eurodollar contracts decreased over the period during which they owned the contracts; otherwise, plaintiffs would have either broken even or profited. To the extent that defendants are liable for the

decrease in the price of plaintiffs' Eurodollar contracts, it must be because LIBOR increased over the time during which plaintiffs owned the contracts and the trading prices of Eurodollar contracts were correlated with the LIBOR fixes. In a basic sense, there are two scenarios in which LIBOR could have increased over the time period that plaintiffs owned their contracts: (1) it started too low and then increased towards its "true" level, or (2) it started at its "true" level and then increased to an artificially high level. The "persistent LIBOR suppression" theory of plaintiffs' amended complaint is based on the first scenario, and the "day-to-day, up or down, manipulation for trading advantage" theory of the Barclays settlements adds the second scenario, at least for those days on which LIBOR was allegedly manipulated upward.

Critically, although these two scenarios differ in how plaintiffs' injury would be caused, the injury would be the same. Specifically, plaintiffs' injury would be that they lost money because the prices of their Eurodollar contracts decreased over the time that they owned them due to defendants' manipulation of those prices. Further, because plaintiffs were not in a position to know the "true" level of LIBOR, they could not have distinguished between injury caused, on the one hand, by LIBOR starting too low and approaching the "normal" level and, on the other, LIBOR starting at a "normal" level and being manipulated upward. Therefore, notice that the prices of plaintiffs' Eurodollar contracts likely decreased due to defendants' alleged manipulation of LIBOR would have been sufficient for inquiry notice, regardless of whether defendants allegedly caused the injury by

setting LIBOR too high or too low. Moreover, as discussed above, plaintiffs were on inquiry notice of their injury by May 29, 2008, as the Peng Report and ensuing articles informed plaintiffs that they likely had been injured by defendants' submission of artificial LIBOR quotes starting in August 2007.

For these reasons, we are skeptical that potential claims based on day-to-day manipulation are timely to the extent they involve contracts purchased between August 2007 and May 29, 2008. In any event, we grant plaintiffs the opportunity to move to amend their complaint to include allegations of day-to-day manipulation, with the expectation that any such motion will address the concerns presented here.

d. Fraudulent Concealment

Plaintiffs additionally argue that the CEA's statute of limitations should be tolled due to defendants' fraudulent concealment of their unlawful conduct. Exchange Opp'n 30-32. The statute of limitations may be tolled "if a plaintiff can show fraudulent concealment of the violation by a defendant." *In re Natural Gas Commodity Litig.* ("*Natural Gas*"), 337 F. Supp. 2d 498, 512 (S.D.N.Y. 2004). To demonstrate fraudulent concealment, a plaintiff must plead, with particularity: "(1) that the defendant concealed the existence of the CEA violation; (2) that the plaintiff remained unaware of the violation during the limitations period; and (3) that the plaintiff's continuing ignorance as to the claim was not a result of a lack of due diligence." *Id.* at 513; *see also id.* at 513-14; Fed. R. Civ. P. 9(b). The first element, the fact of concealment, may be demonstrated

"by showing either [1] that the defendant took affirmative steps to prevent the plaintiff's discovery of his claim or injury or [2] that the wrong itself was of such a nature as to be self-concealing." *Natural Gas*, 337 F. Supp. 2d at 513 (quoting *New York v. Hendrickson Bros.*, 840 F.2d 1065, 1083 (2d Cir. 1988)) (internal quotation marks omitted).

Here, plaintiffs have not adequately alleged fraudulent concealment. For one, they did not "remain[] unaware of [defendants'] violation during the limitations period," as they were on notice no later than May 29, 2008, that they had likely been injured. Moreover, because of this, they could not have reasonably relied on defendants' and the BBA's reassurances that LIBOR was accurate.

For the same reason, defendants' alleged manipulation was not self-concealing. Although plaintiffs cite *Natural Gas* for the proposition that "report[ing] false trade data to entities that collect that information for public dissemination" is "inherently self-concealing," *id.* at 513, the false reporting in *Natural Gas* was distinguishable from the allegedly false reporting here. In *Natural Gas*, the reporting was "designed to be concealed from the general public," and there was "no explanation for how [defendants'] actions, if true, could or should have been discovered by the general public." *Id.* Here, by contrast, Thomson Reuters published daily both the final LIBOR fix and the quotes from each of the panel banks. A person of ordinary intelligence could have reviewed the submitted quotes along with numerous articles analyzing these quotes and explaining why they were

likely artificial. Under these circumstances, plaintiffs have not adequately alleged fraudulent concealment.

e. Which Claims Are Barred

Having determined that plaintiffs were on inquiry notice of their injury no later than May 29, 2008, we must now determine which claims are barred by the statute of limitations. We will present our conclusions by reference to Figure 2, below.

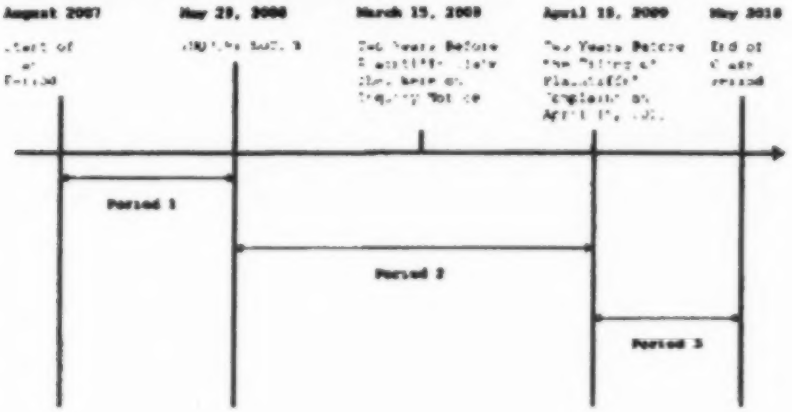

FIGURE 2: INQUIRY NOTICE TIMELINE

As discussed below, we find that some of plaintiffs' claims are barred and some are not, depending on when the contracts that are the basis for those claims were purchased. Specifically, claims based on Eurodollar contracts purchased during Period 1 are barred; claims based on contracts purchased during Period 3 are not barred; and claims based on contracts purchased during Period 2 may or may not be barred, though we will not dismiss them at this stage.

We begin with Period 1, the time from the start of the Class Period, August 2007, to the date of inquiry notice, May 29, 2008. Plaintiffs have argued that the earliest they had notice of their claims is March 15,

2011, and they do not allege that they inquired into their claims any earlier than that date. Assuming that their inquiry in fact commenced on March 15, 2011, it would have been too late, as it would have been more than two years after the date of inquiry notice. By May 29, 2008, any plaintiff who had purchased a Eurodollar contract would have been on notice of his injury, as he would have known that he had likely paid an artificial price for the contract. Accordingly, plaintiffs' claims are barred to the extent that they are based on contracts purchased during Period 1, that is, from the beginning of the Class Period through May 29, 2008.

We next consider Period 3, the time between April 15, 2009, two years prior to the filing of plaintiffs' complaint, and May 2010, the end of the Class Period. As a general matter, inquiry notice is based on a plaintiff's discovery of his injury, and a plaintiff cannot discover his injury until he has been injured. Here, even if plaintiffs who purchased Eurodollar contracts during Period 3 were aware of the articles published in April and May 2008, they could not have been on inquiry notice of their claims any earlier than the date on which they purchased their contracts. Therefore, the claims of plaintiffs who purchased Eurodollar contracts on or after April 15, 2009, are not barred because the complaint was filed within two years of the date of inquiry notice.

Finally, Period 2 describes the time between May 30, 2008, the day after inquiry notice was triggered, and April 14, 2009, two years and one day before the filling of plaintiffs' complaint. Plaintiffs who purchased

Eurodollar contracts during this period, like plaintiffs who purchased during Period 3, could have been on inquiry notice no earlier than the date on which they purchased their contracts. It is not clear, however, precisely when they were on notice. We cannot necessarily charge these plaintiffs with knowledge of the articles published through May 29, 2008, as they had not purchased their contracts yet and may not have had reason to follow LIBOR-related news. However, other articles may have been published during Period 2 that would have put plaintiffs on notice. We are aware of one newspaper article published during this period that focused on LIBOR, albeit one-month USD LIBOR instead of the three-month rate on which Eurodollar contracts are based, Carrick Mollenkamp, *Libor's Accuracy Becomes Issue Again*, Wall St. J., Sept. 24, 2008, and there may be more. In order to decide whether claims based on contracts purchased during this period are barred, we would need to determine (1) when inquiry notice was triggered, (2) whether plaintiffs actually inquired within two years of the date of inquiry notice, and, (3) if so, whether the complaint was filed within two years of the date on which a person of ordinary intelligence, "in the exercise of reasonable diligence," would have discovered his injury. *Koch*, 699 F.3d at 151 (quoting *Lentell v. Merrill Lynch & Co., Inc.*, 396 F.3d 161, 168 (2d Cir. 2005)). At present, we are not in a position to address these questions. Therefore, we cannot conclude that the statute of limitations bars the claims of plaintiffs who purchased Eurodollar contracts during Period 2, between May 30, 2008, and April 14, 2009.

In sum, the CEA's statute of limitations bars plaintiffs' claims based on contracts entered into during Period 1, between August 2007 and May 29, 2008, and does not bar claims based on contracts entered into during Period 3, between April 15, 2009, and May 2010. Plaintiffs' claims based on contracts entered into during Period 2, between May 30, 2008, and April 14, 2009, may or may not be barred, though we will not dismiss them at this stage.[16] Finally, plaintiffs may move to amend their complaint to include allegations based on information derived from the Barclays settlements, provided that any such motion addresses the concerns raised herein and is accompanied by a proposed second amended complaint.

3. Pleading Commodities Manipulation

Finally, defendants argue that plaintiffs have inadequately pleaded their primary claim for commodities manipulation and their secondary claims for vicarious liability for and aiding and abetting commodities manipulation. For the reasons discussed below, we disagree.

a. Legal Standard

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[16] On March 27, 2013, we received from plaintiffs two documents issued by the UK Financial Services Authority (the "FSA"): (1) the "FSA Internal Audit Report: A Review of the Extent of Awareness Within the FSA of Inappropriate LIBOR Submissions," dated March 2013, and (2) the "Management Response" to that report, also dated March 2013. These documents do not alter our conclusions.

Section 9(a) of the CEA makes it a crime for any person "to manipulate or attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any registered entity, or of any swap . . . ." 7 U.S.C. § 13(a)(2). In *DiPlacido v. Commodity Futures Trading Commission*, 364 F. App'x 657 (2d Cir. 2009), the Second Circuit established a four-part test for pleading manipulation under the CEA: plaintiff must show "(1) that [defendant] had the ability to influence market prices; (2) that [he] specifically intended to do so; (3) that artificial prices existed; and (4) that [defendant] caused the artificial prices." *Id.* at 661 (quoting *In re Cox*, No. 75-16, 1987 WL 106879, at *3 (C.F.T.C. July 15, 1987)); *see also In re Platinum & Palladium Commodities Litig.*, 828 F. Supp. 2d 588, 598 (S.D.N.Y. 2011). "[T]o determine whether an artificial price has occurred, one must look at the aggregate forces of supply and demand and search for those factors which are extraneous to the pricing system, are not a legitimate part of the economic pricing of the commodity, or are extrinsic to that commodity market." *In re Sumitomo Copper Litig.*, 182 F.R.D. 85, 91 (S.D.N.Y. 1998) (quoting *In re Indiana Farm Bureau Coop. Ass'n, Inc.*, No. 75-14, 1982 WL 30249, at *39 n.2 (C.F.T.C. Dec. 17, 1982)) (internal quotation marks and emphasis omitted).

Whether plaintiffs are required to allege commodities manipulation with particularity depends on the facts alleged. As we observed in *In re Crude Oil Commodity Litigation* ("*Crude Oil*"), No. 06 Civ. 6677 (NRB), 2007 WL 1946553 (S.D.N.Y. June 28, 2007), Rule 9(b) "is cast in terms of the conduct alleged, and

is not limited to allegations styled or denominated as fraud or expressed in terms of the constituent elements of a fraud cause of action." *Id.* at *5 (quoting *Rombach v. Chang*, 355 F.3d 164, 171 (2d Cir. 2004)) (internal quotation marks omitted). In that case, we held, in the context of a claim for commodities manipulation, that because "the crux of plaintiffs' allegations is that defendants misled the market with regard to supply and demand at Cushing by concealing its capacity and its actions, resulting in artificial prices," plaintiff's allegations sounded in fraud and therefore were subject to Rule 9(b). *Id.* Similarly, here the crux of plaintiffs' claim is that they paid too much for their Eurodollar contracts because their expectation of the contracts' value was informed by existing LIBOR fixes, which were artificial as a result of defendants' submission of artificial quotes to the BBA. In other words, the claim is that defendants, by submitting artificial LIBOR quotes, misled the market with regard to future levels of LIBOR, and by extension future prices of Eurodollar contracts, and thus caused Eurodollar contracts to trade at artificial prices. Like the allegations in Crude Oil, the present allegations sound in fraud and thus must be pled with particularity.

However, courts generally relax Rule 9(b)'s requirements in the context of manipulation claims, as such claims often "involve facts solely within the defendant's knowledge." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 102 (2d Cir. 2007). In the securities context, the Second Circuit has held that "a manipulation complaint must plead with particularity the nature, purpose, and effect of the fraudulent

conduct and the roles of the defendants." *Id.* "This test will be satisfied if the complaint sets forth, to the extent possible, 'what manipulative acts were performed, which defendants performed them, when the manipulative acts were performed, and what effect the scheme had on the market for the securities at issue.'" *Id.* (quoting *Baxter v. A.R. Baron & Co., Inc.*, No. 94 Civ. 3913 (JGK), 1995 WL 600720, at *6 (S.D.N.Y. Oct. 12, 1995)). This standard has also been applied in the context of commodities manipulation. *See, e.g., In re Amaranth Natural Gas Commodities Litig.* ("*Amaranth I*"), 587 F. Supp. 2d 513, 535 (S.D.N.Y. 2008).

Finally, the scienter element "may be alleged generally," Fed. R. Civ. P. 9(b), though plaintiffs must still allege facts that "give rise to a *strong inference* of scienter," *In re Amaranth Natural Gas Commodities Litig.* ("*Amaranth II*"), 612 F. Supp. 2d 376, 384 (S.D.N.Y. 2009) (quoting *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23 (2007)). Plaintiffs may demonstrate scienter "either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *Crude Oil*, 2007 WL 1946553, at *8 (quoting *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290-91 (2d Cir. 2006)) (internal quotation marks omitted). "Sufficient motive allegations entail concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged." *Amaranth II*, 612 F. Supp. 2d at 383 (quoting *Kalnit v. Eichler*, 264 F.3d

131, 139 (2d Cir. 2001)) (internal quotation marks omitted).

In addition to alleging a violation of the CEA, plaintiffs must also show that they have standing to sue. Section 22(a) of the CEA grants a private right of action to any person "who purchased or sold a [futures contract] or swap if the violation constitutes . . . (ii) a manipulation of the price of any such contract or swap or the price of the commodity underlying such contract or swap." 7 U.S.C. § 25(a)(1)(D). The manipulation must cause the plaintiff "actual damages," *id.* § 25(a)(1), which courts have understood to require a "net loss[]," *In re Amaranth Natural Gas Commodities Litig.*, 269 F.R.D. 366, 379 (S.D.N.Y. 2010).

b. The Present Allegations

Here, plaintiffs have stated a claim for commodities manipulation. There are two ways that plaintiffs' manipulation claims can be framed: (1) manipulation of the price of Eurodollar futures contracts, and (2) manipulation of the price of the commodity underlying Eurodollar futures contracts. As discussed below, we find that plaintiffs state a claim for the first type of manipulation, but not for the second.

i. Manipulation of the Price of Eurodollar Futures Contracts

Plaintiffs have stated a claim for commodities manipulation based on manipulation of the price of Eurodollar futures contracts. With regard to the first element of the *DiPlacido* test, there is no question that defendants had the ability to influence the price of

Eurodollar futures contracts. At settlement, the price of Eurodollar contracts is set according to a formula that directly incorporates LIBOR. Prior to settlement, Eurodollar contracts trade "based on what LIBOR is expected to be in the future," and "[t]o the extent that LIBOR is mispriced in the present, expectations of what LIBOR will be in the future will also be skewed." Exchange Am. Compl. ¶ 209. Each defendant, of course, had the ability to influence LIBOR through the quotes it submitted daily to the BBA. Because each defendant had the ability to influence LIBOR and LIBOR affected the price of Eurodollar contracts, each defendant had the ability to influence the price of Eurodollar contracts.

With regard to the second element, plaintiffs' plausibly allege that defendants specifically intended to manipulate the price of Eurodollar futures contracts. Plaintiffs' amended complaint alleges concrete benefits that defendants stood to gain from manipulating Eurodollar futures contract prices. Specifically, plaintiffs allege that "subsidiaries or other affiliates of Defendants . . . trad[ed] LIBOR-based financial instruments such as Eurodollar futures contracts at manipulated prices not reflecting fundamental supply and demand, to the direct benefit of Defendants." *Id.* ¶ 43; *see also id.* ¶ 218 ("Defendants, through their broker-dealer affiliates[,] actively traded Eurodollar futures and options on those futures during the Class Period.").

Moreover, the Barclays settlement documents suggest that Barclays had a concrete economic interest in manipulating the price of Eurodollar contracts and,

indeed, may have manipulated LIBOR for the express purpose of profiting on Eurodollar contracts. *See, e.g.*, CFTC Order 2 ("Barclays based its LIBOR submissions for U.S. Dollar . . . on the requests of Barclays' swaps traders, including former Barclays swaps traders, who were *attempting to affect the official published LIBOR, in order to benefit Barclays' derivatives trading positions; those positions included swaps and futures trading positions* . . . .") (emphasis added); DOJ Statement ¶ 10 ("Barclays employs derivatives traders in New York, New York and in London, England who trade financial instruments tied to LIBOR and EURIBOR, including interest rate swaps and Eurodollar futures contracts . . . ."). These allegations do not describe merely a generalized interest in appearing profitable, but rather identify concrete economic benefits that defendants stood to gain from manipulating the price of Eurodollar futures contracts.

As discussed above, scienter may be established by showing that defendants had both motive and opportunity. *See Crude Oil*, No. 06 Civ. 6677 (NRB), 2007 WL 1946553, at *8 (S.D.N.Y. June 28, 2007). Here, plaintiffs have adequately pleaded motive by alleging that defendants stood to gain concrete benefits from manipulating the price of Eurodollar futures contracts. *See Amaranth II*, 612 F. Supp. 2d 376, 383 (S.D.N.Y. 2009). Additionally, defendants undeniably had the opportunity to manipulate Eurodollar contract prices by submitting artificial LIBOR quotes. Therefore, plaintiffs' allegations give rise to a strong inference of scienter.

The remaining two elements are also satisfied. With regard to the third element, plaintiffs have adequately alleged that artificial Eurodollar futures contract prices existed. The allegations in plaintiffs' amended complaint, together with the facts reported in the Barclays settlement documents, make plausible that LIBOR was set at an artificial level for significant portions of the Class Period. As discussed above, if LIBOR was at an artificial level, the prices at which Eurodollar futures contracts traded and settled necessarily were, as well. Although, as discussed above, LIBOR is set through a cooperative process rather than through supply and demand, there is no question that the manipulation of LIBOR alleged in the amended complaint would be a factor that was "not a legitimate part" of how LIBOR was fixed or Eurodollar contracts were priced. *In re Sumitomo Copper Litig.*, 182 F.R.D. 85, 91 (S.D.N.Y. 1998) (quoting *In re Indiana Farm Bureau Coop. Ass'n, Inc.*, No. 75-14, 1982 WL 30249, at *39 n.2 (C.F.T.C. Dec. 17, 1982)) (emphasis omitted).

Finally, with regard to the fourth element, plaintiffs have adequately alleged that defendants' conduct caused Eurodollar futures contracts to trade and settle at artificial prices. There is no question that defendants submitted LIBOR quotes to the BBA each day and these quotes collectively determined where LIBOR was fixed. As discussed above, plaintiffs have adequately alleged that LIBOR was fixed at artificial levels for substantial parts of the Class Period and that the price of Eurodollar futures contracts is significantly influenced by existing LIBOR fixes. Therefore, although, as discussed below, there are

serious questions regarding whether defendants harmed plaintiffs, plaintiffs have adequately alleged that defendants caused the prices of Eurodollar futures contracts to be artificial.

Moreover, plaintiffs have satisfied Rule 9(b). They have alleged "what manipulative acts were performed" - submitting artificial LIBOR quotes to the BBA - and "which defendants performed them" - each defendant. They have also alleged "when the manipulative acts were performed": on all or a substantial number of the business days during the Class Period, from August 2007 to May 2010. Finally, plaintiffs have adequately alleged "what effect the scheme had on the market for [Eurodollar contracts]": LIBOR is directly incorporated into Eurodollar futures contracts' settlement price and, because of that, also strongly affects the trading price of Eurodollar contracts prior to settlement. In short, by allegedly submitting false LIBOR quotes, defendants manipulated the price of Eurodollar contracts.

Although plaintiffs have not identified precisely how each LIBOR quote from each defendant on each day during the Class Period was or was not artificial, they could not reasonably be expected to do so at this stage of the litigation. It is not a matter of public knowledge what interest rate each bank subjectively expected to pay to borrow U.S. dollars in the London interbank lending market each day during the Class Period, nor is it publicly known what interest rates each bank paid in fact. Because plaintiffs could not have known the "true" level of any LIBOR quote, they could not have pleaded, consistent with Rule 11, precisely which quotes were inaccurate and by how

much. If anyone currently possesses this information for each day during the Class Period, it is defendants, and in such a situation, Rule 9(b)'s requirements are relaxed. *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 102 (2d Cir. 2007).

What plaintiffs have provided are, *inter alia*, graphs showing how LIBOR as well as individual defendants' LIBOR quotes diverged during the Class Period from benchmarks that they should have tracked. These graphs, of course, are one way of presenting a series of data points that correspond to individual LIBOR quotes and corresponding benchmarks on each day during the Class Period, just as a chart would. However presented, this information describes, to the degree plaintiffs are able, which LIBOR quotes were likely artificial and by roughly how much. Moreover, even to the extent that plaintiffs have affirmatively alleged LIBOR manipulation not for each day, but only over a 34-month-long period, this does not necessarily mean that the allegations are insufficiently specific. *See, e.g.*, *In re Natural Gas*, 358 F. Supp. 2d 336, 344-45 (S.D.N.Y. 2005) (finding that plaintiffs had adequately pleaded a commodities manipulation claim where they had alleged that defendants engaged in manipulative acts "from June 1999 to February 2001" and "between March 2001 and December 2002"). In light of the limited information publicly available, plaintiffs have adequately alleged that defendants submitted artificial LIBOR quotes during the Class Period and thereby manipulated the price of Eurodollar futures contracts.

Finally, plaintiffs have adequately demonstrated that they have standing to sue under the CEA. Plaintiffs have plainly alleged that they purchased Eurodollars futures contracts during the Class Period. They have also alleged that defendants manipulated the price of Eurodollar futures contracts.

Defendants dispute whether plaintiffs have alleged "actual damages." 7 U.S.C. § 25(a)(1). The showing plaintiffs must make to demonstrate actual damages, understood, as discussed above, as a net loss, depends on the type of manipulation involved. Where plaintiffs' injury results from isolated manipulative conduct by defendants, such as artificial stock purchases in the immediate aftermath of an initial public offering in order to drive up price, "allegations of artificial inflation are sufficient to plead loss causation because it is fair to infer that the inflationary effect must inevitably diminish over time." *In re Initial Public Offering Sec. Litig.* ("*IPO*"), 297 F. Supp. 2d 668, 674-75 (S.D.N.Y. 2003). In such a situation, "[i]t is that dissipation - and not the inflation itself - that caused plaintiffs' loss." *Id.* at 675.

By contrast, where plaintiffs' injury results from defendants' dissemination of false information, "an inflated purchase price will not itself constitute or proximately cause the relevant economic loss." *Dura Pharm., Inc. v. Broudo*, 544 U.S. 336, 342 (2005). "Once a misstatement or omission infects the pool of available information, it continues to affect the stock price until contradictory information becomes available." *IPO*, 297 F. Supp. 2d at 674. A plaintiff who purchased at an inflated price might have sold his

instrument before the false information had been corrected, thus not suffering a loss at all, or might have sold it at a loss but where the loss was caused by something other than the defendant's misrepresentation. *See Dura*, 544 U.S. at 342-43; *see also Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 679 (7th Cir. 2009) (interpreting *Dura* to hold that "an allegation that the plaintiffs had bought securities at 'artificially inflated prices' did not state a claim that the plaintiffs had been injured by the inflation because, for all that appeared, the prices had remained at that level, or even a higher one, or the plaintiffs had sold before the price bubble burst"). In short, if the manipulation alleged here is analogous to isolated artificial stock purchases, we can presume that plaintiffs suffered damages based on an inflated purchase price. If, however, the manipulation is more akin to disseminating inaccurate information, plaintiffs need to show that they sold or settled their Eurodollar contracts at a loss.

In this case, the alleged manipulation is less like isolated manipulative activity and more like disseminating false information. In addressing isolated manipulative activity, courts have justified their conclusion that the plaintiff only needs to show that he paid an inflated purchase price by reasoning that the price will presumably return to its normal level, and thus the plaintiff will presumably have suffered injury. Here, by contrast, plaintiffs have alleged that LIBOR was at an artificial level for the duration of the Class Period, not returning to its "normal" level until after the Class Period had ended. Exchange Am. Compl. ¶ 3 (alleging that defendants

"systematically manipulated LIBOR rates . . . during the Class Period"); *id.* ¶ 13 (alleging that defendants' manipulation persisted "[t]hroughout the Class Period"). This is not to deny that, as plaintiffs allege, the degree of artificiality, or how many basis points LIBOR was "off" by, likely varied. *See* Tr. 70 ("The degree of artificiality got much worse, particularly after Lehman Brothers [filed for bankruptcy protection, on September 15, 2008], and then had fluctuations, and then . . . , after the subpoenas, disappeared. But it's varied."); Exchange Am. Compl. 22 (showing that the spread between LIBOR and the Federal Reserve Eurodollar Deposit Rate varied over the Class Period). However, because LIBOR never returned to its "normal" level within the Class Period, the mere fact that plaintiffs purchased their Eurodollar contracts at an inflated price does not show that they suffered a loss on those contracts.

Rather, as in the "false information" scenario, plaintiffs may or may not have suffered a loss caused by defendants' manipulation, depending on what the price was when they sold their contracts and what else might have been responsible for the loss. Although the manipulation alleged here is not perfectly analogous to disseminating false information, given that LIBOR was fixed anew every day and that the degree of artificiality likely varied, the two types of manipulation are similar in the important respect that the price remained at artificial levels, such that it is not clear that a contract purchased at artificial prices would have been sold at a loss.

In their amended complaint, plaintiffs have not identified each individual Eurodollar futures contract that they purchased, let alone these contracts' purchase price, sale date, and sale price. Rather, they allege that they purchased Eurodollar contracts during the Class Period at prices that were artificially high as a result of defendants' manipulation of LIBOR, Exchange Am. Compl. ¶¶ 214-220, that the degree of LIBOR artificiality likely varied over the Class Period, *id.* ¶ 22, and that they "were harmed as a consequence of Defendants' unlawful conduct," *id.* ¶ 20; *see also id.* ¶¶ 21-26. Defendants argue that these allegations are insufficient to allege actual damages. Exchange MTD 23.

We disagree. Although plaintiffs will not be able to recover unless they prove that they sold or settled their contracts at a loss due to defendants' manipulation, they cannot be expected to have alleged with such precision in their amended complaint. To know which contracts were sold or settled at a loss because of defendants' conduct, plaintiffs would need to compare the spread between LIBOR's "true" level and its actual level at the time the contract was purchased and the time the contract was sold or settled. Plaintiffs would suffer loss only if the spread changed in a manner that resulted in a lower sale price. In other words, to have pleaded loss causation in the manner suggested by defendants, plaintiffs would have needed to know the "true" LIBOR level at the time they purchased and sold their contracts.

Although this information might be in the possession of defendants, it could not be known by plaintiffs.[17] The benchmarks referenced by plaintiffs, though generally probative of when LIBOR was at an artificial level, do not indicate precisely at which level LIBOR should have been fixed on any given day. *See, e.g.*, Mollenkamp & Whitehouse, *supra* (explaining that default insurance prices, though they provide a good long-term picture of "investors' assessment of the financial health of banks," are imperfect indicators when viewed individually because they are "based on dealers' quotes, which can be volatile and vary widely in times of market turmoil"); Peng Report (noting that the Federal Reserve Eurodollar Deposit Rate measures the "bid rate," or rate at which banks are willing to borrow, rather than the "offered rate," or rate at which banks are willing to lend). Therefore, in contrast to a situation in which the defendant disseminated false information and the plaintiff can allege precisely when the false statements were made and what was false about them, here plaintiffs cannot reasonably be expected to know the spread between LIBOR's "true"

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[17] Indeed, it may be that no one knows what LIBOR's "true" level was for any day during the Class Period. As discussed above, LIBOR is inherently a theoretical value, derived as it is from quotes that are not based directly on any objective data. Moreover, the challenge of determining LIBOR's "true" level would be compounded with respect to periods of time, such as the Class Period, during which the volume of actual interbank trading was at a significantly reduced level.

value and its actual level on any given day, let alone how this spread changed over time.

In these circumstances, plaintiffs have adequately alleged actual damages by alleging that they purchased their contracts at an inflated price, that the degree of LIBOR artificiality later changed, and that they suffered damages as a result. That said, in order to recover, plaintiffs will ultimately need to demonstrate that they sold or settled their Eurodollar contracts at a loss and that this loss resulted from defendants' misconduct. We anticipate that meeting this burden might pose a serious challenge for plaintiffs, especially with regard to Eurodollar contracts that were both purchased and sold within the Class Period.

In short, although we have doubts about whether plaintiffs will ultimately be able to demonstrate that they sold or settled their Eurodollar contracts at a loss as a result of defendants' conduct, we find that they have adequately alleged that defendants manipulated the price of Eurodollar contracts and that this manipulation caused them actual damages.

ii. Manipulation of the Price of the Commodity Underlying Eurodollar Futures Contracts

By contrast, plaintiffs do not even have standing to bring suit for commodities manipulation when framed as defendants' manipulation of LIBOR as the

commodity underlying Eurodollar futures contracts.[18] As discussed above, section 22(a) of the CEA grants a private right of action to any person "who purchased or sold a [futures contract] or swap if the violation constitutes . . . (ii) a manipulation of the price of any such contract or swap or the price of the commodity underlying such contract or swap." 7 U.S.C. § 25(a)(1)(D). A "commodity" is broadly defined to include "all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt in." 7 U.S.C. § 1a(9).

If plaintiffs had a viable claim for manipulation of LIBOR qua commodity, the claim would be that defendants manipulated "the price of the commodity underlying [the] contract or swap" that plaintiffs purchased or sold. *Id.* § 25(a)(1)(D)(ii). The relevant question, therefore, is not whether LIBOR is a "commodity" in some freestanding sense, but rather

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[18] The implication of this conclusion is that, although plaintiffs will proceed on their commodities manipulation claims, they are precluded from pursuing those claims with regard to defendants' alleged manipulation of LIBOR qua commodity. In order to recover, therefore, they will need to show that defendants specifically intended to manipulate the price of Eurodollar futures contracts, not merely LIBOR itself. As a practical matter, we anticipate that this limitation might have significant repercussions for the relief that plaintiffs are ultimately able to recover.

whether LIBOR is the commodity underlying Eurodollar futures contracts.[19]

As discussed above, a Eurodollar futures contract is a futures contract whose "underlying instrument" is a "Eurodollar Time Deposit having a principal value of USD $1,000,000 with a three-month maturity." CME Group, *Eurodollar Futures: Contract Specifications*, http://www.cmegroup.com/trading/interest-rates/stir/eurodollar_contract_specifications.html (last visited Mar. 29, 2013). "Eurodollars are U.S. dollars deposited in commercial banks outside the United States." CME Group, *Eurodollar Futures*, http://www.cmegroup.com/trading/interest-rates/files/IR148_Eurodollar_Futures_Fact_Card.pdf. At settlement, the price of a Eurodollar futures contract "is equal to 100 minus the three-month Eurodollar interbank time deposit rate," which rate is defined as the LIBOR fix on the contract's last trading day. CME Group, *Eurodollar Futures Final Settlement Procedure*, http://www.cmegroup.com/trading/ interest-rates/files/final-settlement-procedure-eurodollar-futures.pdf. Prior to settlement, "the price of a 3-month Eurodollar futures contract is an indication of

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[19] For this reason, we need not take a position on what degree of deference we owe, if any, to the CFTC statements cited by plaintiffs. *See, e.g.*, CFTC Order, at 27 ("Barclays' traders and submitters each specifically intended to affect the price at which the daily BBA LIBOR for U.S. Dollar, Sterling, and Yen (for particular tenors), and the EBF Euribor (for particular tenors), all commodities in interstate commerce, would be fixed.").

the market's prediction of the 3-month Dollar LIBOR on [that] date." DOJ Statement ¶ 9.

The only plausible way to characterize the components of a Eurodollar contract is that the underlying commodity is a USD 1,000,000 deposit in a foreign commercial bank with a three-month maturity, and the price of the contract is settled or traded at a value based on LIBOR. In other words, Eurodollar contracts use LIBOR to represent the price of U.S. dollars deposited in commercial banks abroad. This makes sense because LIBOR, in theory, is an average of the rates at which banks lend U.S. dollars to each other in the London market.

Understood thusly, a Eurodollar futures contract is not fundamentally different from any other futures contract traded on the CME. For example, in a corn futures contract, the underlying commodity is 5000 bushels of corn of a specified grade. CME Group, *Corn Futures*, http://www.cmegroup.com/trading/agricultural/grain-and-oilseed/corn_contract_specifications.html (last visited Mar. 29, 2013). Because these contracts require the "short" to deliver to the "long" the specified quantity and quality of corn at the end of the contract (even though traders may in reality enter into offsetting contracts to avoid actual physical delivery, *see* Am. Compl. ¶ 208), see CME Group, *CBOT Corn Final Settlement Procedure*, http://www.cmegroup.com/trading/agricultural/files/final-settlement-procedure-cbot-corn.pdf, the price of the corn futures contract will track the price of physical corn, that is, corn in the "spot" or "cash" market. Indeed, as a general matter, the prices in a

given commodity's futures market and cash market will be closely correlated. *See, e.g.*, *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 488 (7th Cir. 2002) (finding that "the prices of cathode and cathode futures 'tend to move in lockstep'"); *Sanner v. Bd. of Trade of City of Chicago*, 62 F.3d 918, 929 (7th Cir. 1995) ("It is clear that '[w]hen the futures market experiences a significant price change, the prices of that commodity in the cash market will usually experience a similar movement.' The reason for this is obvious: both markets involve the same commodities to be delivered currently or in the future." (citation omitted) (quoting I. Philip Johnson & Thomas Hazen, *Commodities Regulation* § 104 (2d ed. 1989))).

In the context of Eurodollar futures, even though the "short" is not even nominally required to deliver the underlying cash deposit to the "long," the contract's pricing structure, which is what matters here, is the same as with corn futures. Just as in corn futures contracts, the underlying commodity is corn and the price of the contract tracks the price of corn, so in Eurodollar futures contracts, the underlying commodity is a deposit of U.S. dollars in a foreign commercial bank and the price of the contract is based on LIBOR, which represents the price of (i.e. interest on) that deposit. Indeed, plaintiffs have characterized LIBOR as "the reference price for the [Eurodollar] futures contract just as the physical prices of soybean or silver are the reference price for their respective futures contracts traded on exchanges." Exchange Am. Compl. ¶ 207.

Despite apparently acknowledging that the above understanding of Eurodollar contracts is correct, plaintiffs advance an alternative theory in their opposition brief. Specifically, plaintiffs maintain that the underlying commodity of Eurodollar futures contracts is LIBOR and the price of those contracts is "the level of LIBOR." Exchange Opp'n 10. This characterization strikes us as strained, at best. Indeed, if there is any meaningful distinction between the London Interbank Offered *Rate* and the "level of" that rate, it eludes us. Therefore, LIBOR is not the commodity underlying Eurodollar futures contracts, and plaintiffs do not have standing to bring suit against defendants based on the manipulation of LIBOR as a commodity.

c. Vicarious Liability

Plaintiffs also assert a cause of action for vicarious liability for commodities manipulation. With regard to vicarious liability, section 2(a)(1) of the CEA provides:

> The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person.

7 U.S.C. § 2(a)(1)(B). "[T]o state a claim for vicarious liability, plaintiffs must allege that the principal manifested an intent to grant the agent authority, the agent agreed, and the principal 'maintain[ed] control over key aspects of the undertaking.'" *In re Amaranth*

Natural Gas Commodities Litig., 587 F. Supp. 2d 513, 546 (S.D.N.Y. 2008) (quoting *Commercial Union Ins. Co. v. Alitalia Airlines, S.p.A.*, 347 F.3d 448, 462 (2d Cir. 2003)).

Defendants argue, in a discussion confined to one footnote, that plaintiffs have failed to state a claim for vicarious liability. According to defendants, "Plaintiffs have neither alleged any facts regarding any agent of any of the Defendants nor identified any conduct allegedly taken by such agents within the scope of this principal-agent relationship to further the alleged violations of the CEA." Exchange MTD 29 n.27.

Defendants' argument is not convincing. In their amended complaint, plaintiffs have identified several "[i]ndividuals employed by the Defendants and their affiliates who have engaged in the illegal communications and conduct among Defendants to report artificially low LIBOR quotes." Exchange Am. Compl. ¶ 181. For instance, the complaint names Yvan Ducrot, "the Cohead of UBS's rates business," and Holger Seger, "the global head of short-term interest rates trading at UBS." *Id.* According to an article cited by plaintiffs, these persons were suspended by UBS in connection with investigations into the manipulation of LIBOR. The employees are clearly agents of UBS, and it is plausible that they contributed to the alleged manipulation of LIBOR within the scope of their employment.

Moreover, the Barclays settlement papers indicate that Barclays employees contributed to the manipulation of USD LIBOR within the scope of their employment. *See, e.g.*, DOJ Statement ¶ 50 ("Barclays

acknowledges that the wrongful acts taken by the participating employees in furtherance of this misconduct set forth above were within the scope of their employment at Barclays. Barclays acknowledges that the participating employees intended, at least in part, to benefit Barclays through the actions decried above."). Therefore, although plaintiffs will only be able to recover on this claim with regard to those employees involved in the manipulation of USD LIBOR, not of other indices such as Yen LIBOR or TIBOR, we find that plaintiffs have adequately stated a claim for vicarious liability for commodities manipulation.

d. Aiding and Abetting

Finally, plaintiffs assert a cause of action for aiding and abetting commodities manipulation. Under section 22(a) of the CEA, plaintiffs may bring suit against "[a]ny person . . . who violates this chapter or who willfully aids, abets, counsels, induces, or procures the commission of a violation of this chapter." 7 U.S.C. § 25(a)(1). "[T]o state a claim for aiding and abetting a violation of the CEA, plaintiffs must allege that a defendant, [1] knowing of a principal's intent to manipulate the market and [2] intending to further that manipulation, [3] performed an act in furtherance of the manipulation." *In re Amaranth Natural Gas Commodities Litig.*, 587 F. Supp. 2d 513, 541 (S.D.N.Y. 2008).

Defendants argue that plaintiffs fail to state a claim for aiding and abetting, both because they fail to state a primary violation of the CEA and because they fail to satisfy the elements set out above. Exchange

MTD 28-29. At oral argument, defendants elaborated that even if each bank had an incentive to improve the market's perception of its financial health, this incentive would have given the bank at most an interest in having a low LIBOR quote itself, not in there being a low LIBOR fix. Tr. 78. Indeed, defendants argued, each defendant would have wanted "to show [itself] as comparatively healthier than the next bank," and thus would not have had incentive to aid another bank in submitting a low LIBOR quote. *Id.*

Although we are skeptical, as discussed below, that plaintiffs' aiding and abetting claim involves separate conduct from plaintiffs' primary claim for commodities manipulation, we find that plaintiffs have adequately stated a claim. First, as discussed above, plaintiffs have adequately alleged that defendants committed the primary violation of manipulation of the price of Eurodollar futures contracts. Second, although defendants are correct that no defendant would have had an incentive to make other banks' look financially healthier, this is not sufficient to dismiss plaintiffs' claim. Given that the London interbank lending market involved lending between defendants, among other banks, it is plausible that each defendant was aware that other defendants' LIBOR quotes did not reflect the rate at which those banks actually expected to borrow. Moreover, in light of the fact that Eurodollar futures contracts "are the largest and most actively traded futures contracts," Exchange Am. Compl. ¶ 218, each bank likely knew that other banks had an interest in manipulating the price of Eurodollar contracts.

Additionally, plaintiffs have alleged that the affiliates of all or a substantial number of defendants traded Eurodollar contracts "to the direct benefit of Defendants." *Id.* ¶ 43; *see also id.* ¶ 218. Thus, it is plausible that defendants had a common interest not only in LIBOR's being fixed at an artificial level, but also in the price of Eurodollar contracts being manipulated. Even beyond this common interest, moreover, the Barclays settlement documents suggest that Barclays cooperated with other banks, including banks on the USD LIBOR panel, in ways that were not necessarily in the mutual interest of all parties involved. For example:

> From at least approximately August 2005 through at least approximately May 2008, certain Barclays swaps traders communicated with swaps traders at other Contributor Panel banks and other financial institutions about requesting LIBOR and EURIBOR contributions that would be favorable to the trading positions of the Barclays swaps traders and/or their counterparts at other financial institutions.

DOJ Statement ¶ 23. Although these allegations do not directly implicate specific defendants other than Barclays, they indicate that Barclays cooperated with other panel banks in a manner that each bank might not have if it were acting solely in its own interest.

Finally, it is plausible that each bank, by allegedly submitting artificial LIBOR quotes, furthered other banks' manipulation of the price of Eurodollar futures contracts. For one, as discussed above, each LIBOR quote influenced the final LIBOR fix, whether it was

included in the final average or not, and thus influenced the price of Eurodollar futures contracts. Additionally, it is plausible that each defendant furthered other defendants' manipulation by submitting a quote that was roughly in line with ("clustered with") other quotes, thus decreasing the chance of detection. *See* Tr. 75; *see also* Mollenkamp & Whitehouse, *supra* (quoting Stanford finance professor's observation that the USD LIBOR quotes from January 2008 to April 2008 were "'far too similar to be believed'").

In short, plaintiffs have adequately alleged a claim for aiding and abetting defendants' manipulation of the price of Eurodollar futures contracts. That said, we have serious questions about whether this claim would support awarding plaintiffs any damages beyond those awarded based on the underlying manipulation claim. It appears that the only way a defendant could aid or abet another defendants' manipulation is by itself submitting an artificial LIBOR quote. Moreover, because an aiding and abetting claim would require the specific intent to further another defendant's manipulation of the price of Eurodollar futures contracts, it would seem that the scienter element plaintiffs would need to satisfy for aiding and abetting would be the same as the scienter element for the primary CEA violation. Therefore, it is hard for us to envision a scenario in which we would award plaintiffs any damages based on their aiding and abetting claim beyond what they would be awarded based on their underlying manipulation claim. If, after discovery, it appears that the aiding and abetting claim is wholly duplicative of the primary

claim, plaintiffs will not have the benefit of submitting both claims to the factfinder.

C. RICO Claim

The Schwab plaintiffs assert a single cause of action for violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968 (2006 & Supp. III 2009). Defendants have moved to dismiss this claim on six grounds: (1) the claim is barred by the Private Securities Litigation Reform Act of 1995 (the "PSLRA"), Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 U.S.C.); (2) the claim seeks an impermissible extraterritorial application of U.S. law; (3) plaintiffs lack standing; (4) plaintiffs fail to plead predicate acts of racketeering; (5) plaintiffs fail to plead a pattern of racketeering activity; and (6) to the extent plaintiffs assert a claim for conspiracy to violate RICO, plaintiffs fail to state a claim. We find that each of the first two grounds is sufficient to dismiss plaintiffs' RICO claim.

1. RICO

Although we do not need to decide whether plaintiffs have adequately pleaded their RICO claim, a brief overview of RICO and its alleged application to the present facts is necessary to provide context to the issues we do need to decide. Under 18 U.S.C. § 1962(c), it is unlawful for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. §

1962(c). The RICO statute grants a private right of action to "[a]ny person injured in his business or property by reason of a violation of section 1962." 18 U.S.C. § 1964(c). Plaintiffs may recover treble damages and attorney's fees. *Id.*

One way of pleading an enterprise is to allege an "association in fact," that is, "a group of persons associated together for a common purpose of engaging in a course of conduct." *Elsevier Inc. v. W.H.P.R., Inc.*, 692 F. Supp. 2d 297, 305 (S.D.N.Y. 2010). Under *Boyle v. United* States, 556 U.S. 938 (2009), "an association in fact enterprise must have a 'structure' exhibiting three features: [1] a purpose, [2] relationships among the individuals associated with the enterprise, and [3] longevity sufficient to permit the associates to pursue the purpose of the enterprise." Elsevier, 692 F. Supp. 2d at 305-06 (citing *Boyle v. United States*, 556 U.S. at 946).

Racketeering activity includes, *inter alia*, wire fraud, mail fraud, and bank fraud. 18 U.S.C. § 1961(1). To state a claim for mail or wire fraud, a plaintiff must allege "(1) the existence of a scheme to defraud, (2) the defendant's knowing or intentional participation in the scheme, and (3) the use of interstate mails or transmission facilities in furtherance of the scheme." *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 301 (S.D.N.Y. 2000) (citing *S.Q.K.F.C., Inc. v. Bell Atlantic Tricon Leasing Corp.*, 84 F.3d 629, 633 (2d Cir. 1996)); *see also* 18 U.S.C. § 1341 (mail fraud); *id.* § 1343 (wire fraud). To state a claim for bank fraud, a plaintiff must allege that defendant executed or attempted to execute a

scheme "to defraud a financial institution" or "to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1344.

A pattern of racketeering activity requires "at least two acts of racketeering activity" occurring within ten years of each other. *Id.* § 1961(5). "[T]o establish a 'pattern' of racketeering activity, plaintiffs 'must show [1] that the racketeering predicates are related, and [2] that they amount to or pose a threat of continued criminal activity." *Jerome M. Sobel & Co. v. Fleck*, No. 03 Civ.1041, 2003 WL 22839799, at *9 (S.D.N.Y. Dec. 1, 2003) (alteration in original) (quoting *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989)). "Predicate acts are related if they have the 'same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events.'" *Davis Lee Pharmacy, Inc., v. Manhattan Central Capital Corp.*, 327 F. Supp. 2d 159, 164 (E.D.N.Y. 2004) (quoting *H.J. Inc.*, 492 U.S. at 240 (1989)). The "continuity" element may be satisfied by, *inter alia*, "closed-ended" continuity, involving "a closed period of repeated conduct." *H.J. Inc.*, 492 U.S. at 241.

Under 18 U.S.C. § 1962(d), it is also unlawful "for any person to conspire to violate" section 1962(c). 18 U.S.C. § 1962(d). "To adequately plead a violation of § 1962(d) in the Second Circuit, a plaintiff need only allege that a 'conspirator intend[ed] to further an

endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense." *Gulf Coast Development Group, LLC v. Lebror*, No. 02 Civ. 6949, 2003 WL 22871914, at *5 (S.D.N.Y. Dec. 4, 2003) (quoting *Baisch v. Gallina*, 346 F.3d 366, 376 (2d Cir. 2003)). Plaintiffs need not show an overt act in order to plead a violation of section 1962(d), though "injury from an overt act is necessary and sufficient to establish civil standing for a RICO conspiracy violation." *Hecht v. Commerce Clearing House, Inc.*, 897 F.2d 21, 25 (2d Cir. 1990).

Here, plaintiffs claim that defendants violated both section 1962(c) and section 1962(d). With regard to section 1962(c), plaintiffs allege that all of the defendants were part of an association in fact, whose purpose was to "cause the BBA to set LIBOR artificially low" by each defendant's misrepresentation of its expected borrowing costs, and thereby to "allow[] Defendants to increase their net interest revenues by making artificially low payments to investors such as [plaintiffs]." Schwab Bank Am. Compl. ¶ 219. This enterprise allegedly lasted "[f]or at least four years before [plaintiffs'] Complaint[s were] filed." *Id.* ¶ 220. The enterprise's affairs, moreover, were allegedly conducted through a pattern of racketeering activity, namely mail fraud, wire fraud, and bank fraud. *Id.* ¶ 222. In addition to allegedly committing the above RICO violation, defendants allegedly conspired to violate RICO. According to plaintiffs, "[d]efendants organized and implemented the scheme, and ensured it continued uninterrupted by concealing their manipulation of LIBOR from investors, including [plaintiffs]." *Id.* ¶ 232. Plaintiffs allege that they

suffered direct and foreseeable injury from defendants' scheme by "unknowingly pa[ying] money to Defendants for LIBOR-based financial instruments that paid interest at a manipulated rate, and in fact collect[ing] less interest than they would have absent the conspiracy." *Id.* ¶ 234.

2. The PSLRA

Plaintiffs' RICO claim is barred by the PSLRA. In a provision that has become known as the "RICO Amendment," the PSLRA amended RICO to provide that "no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962." 18 U.S.C. § 1964(c). This provision is interpreted "broadly," *Eagletech Commc'ns Inc. v. Citigroup, Inc.*, No. 07-60668-CIV, 2008 WL 3166533, at *9 (S.D. Fla. June 27, 2008), and bars a RICO claim "even where a plaintiff cannot itself pursue a securities fraud action against the defendant," *MLSMK Inv. Co. v. JP Morgan Chase & Co.*, 651 F.3d 268, 277 (2d Cir. 2011); *see also Gilmore v. Gilmore*, No. 09 Civ. 6230, 2011 WL 3874880, at *4 (S.D.N.Y. Sept. 1, 2011). In other words, a plaintiff is prohibited from bringing a RICO claim not only when she, herself, could have brought a securities fraud claim based on the RICO predicate acts, but also when the SEC could have brought such a claim. *See Eagletech*, 2008 WL 3166533, at *14 (holding that "the PSLRA acts as a bar to Plaintiffs' RICO claims" because "the predicate acts are actionable as securities fraud and may be prosecuted by the SEC"). The question here, therefore, is whether the predicate acts of plaintiffs' RICO claim could have

been the subject of a securities fraud action brought either by plaintiffs themselves or by the SEC.

a. Securities Fraud

Under section 10(b) of the '34 Act, the provision criminalizing securities fraud:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange – . . . To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

15 U.S.C. § 78j.

Because the requirements for the SEC to bring suit for securities fraud are less stringent than the requirements for a private plaintiff to bring suit, *see SEC v. Boock*, No. 09 Civ. 8261, 2011 WL 3792819, at *21 (S.D.N.Y. Aug. 25, 2011), the dispositive inquiry is whether the alleged predicate acts could form the basis for a securities fraud suit by the SEC, *see Eagletech*, 2008 WL 3166533, at *14. The SEC may assert a cause of action for securities fraud if it alleges that the defendant: "(1) made a material misrepresentation or a material omission as to which he had a duty to speak,

or used a fraudulent device; (2) with scienter; (3) in connection with the purchase or sale of securities." *Boock*, 2011 WL 3792819, at *21 (quoting *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999)) (internal quotation marks omitted); *cf. Gilmore*, 2011 WL 3874880, at *4 (holding that a private plaintiff asserting a cause of action for securities fraud under section 10(b) would need to prove, in addition to the above three elements: (1) reliance by plaintiff on defendant's misrepresentation or omission, (2) economic loss, and (3) loss causation).

To prove scienter, the SEC must demonstrate the defendant's "intent to deceive, manipulate, or defraud, or knowing misconduct." *Boock*, 2011 WL 3792819, at *21 (quoting *In re Carter-Wallace, Inc. Sec. Litig.*, 220 F.3d 36, 39 (2d Cir. 2000)) (internal quotation marks omitted). To prove that the defendant's material misrepresentation or omission was made "in connection with the purchase or sale of securities," the SEC need only show that "the scheme to defraud and the sale of securities coincide[d]." *Seippel v. Jenkens & Gilchrest, P.C.*, 341 F. Supp. 2d 363, 373 (S.D.N.Y. 2004) (quoting *SEC v. Zandford*, 535 U.S. 813, 820 (2002)) (internal quotation marks omitted). The scheme to defraud and the sale of securities "coincide" when they are not "independent events," *id.* at 374 (quoting *Zandford*, 535 U.S. at 820), but rather "are 'less tangentially related,' or more closely dependent on each other," *id.* (quoting *Jacoboni v. KPMG LLP*, 314 F. Supp. 2d 1172, 1179 (M.D. Fla. 2004)). In other words, although showing that the plaintiff purchased a security in reliance on a misrepresentation or omission by the defendant regarding the security's value would

likely be sufficient to satisfy the "in connection with" element, such a showing would not be necessary. *See id.* at 373. Indeed, the "in connection with" element should be "construed not technically and restrictively, but flexibly to effectuate [the statute's] remedial purposes." *Id.* at 372 (quoting *Zandford*, 535 U.S. at 819) (internal quotation marks omitted)."

b. Application of the RICO Amendment

Plaintiffs concede that at least some of the LIBOR-based financial instruments they purchased from defendants were securities. Schwab Opp'n 5-10. At least with regard to these instruments, the conduct alleged by plaintiffs could have been the subject of a suit for securities fraud brought by the SEC.

First, defendants allegedly "made a material misrepresentation or a material omission as to which [they] had a duty to speak." *Boock*, 2011 WL 3792819, at *21 (quoting *SEC v. Monarch Funding Corp.*, 192 F.3d 295, 308 (2d Cir. 1999)). In their amended complaint, plaintiffs allege that defendants mailed, in furtherance of their fraudulent scheme, "(i) documents offering for sale LIBOR-based financial instruments and (ii) correspondence regarding offerings of LIBOR-based financial instruments." Schwab Bank Am. Compl. ¶ 223. Defendants also allegedly transmitted by wire, in furtherance of their fraudulent scheme, "documents offering LIBOR-based financial instruments for sale." *Id.* ¶ 225. Both the mailings and the wires were sent "for the purpose of obtaining money from [holders of LIBOR-based financial instruments] through 'false or fraudulent pretenses,

representations, or promises.'" *Id.* ¶ 224; *see also id.* ¶ 225.

Plaintiffs argue that, despite these allegations, "the mailings and wire transmissions that actually were directed to Plaintiffs are not alleged to have been false or misleading." Schwab Opp'n 9; *see also* Tr. 88. Rather, plaintiffs maintain, "Defendants' misrepresentations were directed not at buyers of specific securities, but at the BBA." Schwab Opp'n 9; *see also* Tr. 88. This argument, however, is in irreconcilable tension with plaintiffs' allegation that defendants sent them mailings and wires for the purpose of obtaining money from them through "false or fraudulent pretenses, representations, or promises." Schwab Bank Am. Compl. ¶¶ 224-25. Only through a contorted reading of this allegation could plaintiffs suggest that defendants' "false or fraudulent pretenses, representations, or promises" were made not in the mailings and wires to plaintiffs, but rather in wires to the BBA. A more plausible reading of plaintiffs' allegations is that the misleading statements were made to plaintiffs in the offering materials they received from defendants.

Indeed, such a reading makes sense. If the offering materials described how LIBOR was calculated by reference to the "proper" procedures rather than the manipulation that allegedly was occurring, they would contain a material misrepresentation. If they did not describe how LIBOR was calculated, they would still be omitting that LIBOR was being manipulated, surely a material omission.

The allegations in plaintiffs' original complaints confirm our conclusion that the offering materials defendants sent plaintiffs were misleading. Those complaints asserted a cause of action for securities fraud in violation of section 10(b). *See, e.g.*, Schwab Bank Compl. ¶¶ 138-47 (Aug. 23, 2011). The securities fraud claim was withdrawn in the amended complaint, a decision that, according to plaintiffs' counsel, was not manipulative, but rather took account of their realization that they would not have been able to prove reliance on defendants' misrepresentations. Tr. 86-87. Frankly, this explanation strikes us as a dubious position adopted in an effort by plaintiffs to disown their original complaint and thereby avoid dismissal of their RICO claim, a claim whose siren song of treble damages apparently proved irresistible. Nonetheless, for purposes of the present analysis, we need not decide whether plaintiffs amended their complaint in good faith. Even crediting plaintiffs' withdrawal of their securities fraud claim in their amended complaint, the factual allegations plaintiffs made in support of that claim remain relevant as party admissions. *See Austin v. Ford Models, Inc.*, 149 F.3d 148, 155 (2d Cir. 1998), *abrogated on other grounds by Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002) ("The amendment of a pleading does not make it any the less an admission of the party." (quoting *Andrews v. Metro N. Commuter R.R. Co.*, 882 F.2d 705, 707 (2d Cir. 1989)) (internal quotation marks omitted)).

In their original complaint, plaintiffs clearly alleged that defendants made misleading statements in connection with the sale of securities. Specifically, plaintiffs alleged that "Defendants, directly and

indirectly, by the use, means or instrumentalities of interstate commerce or of the mails, engaged and participated in a continuous course of conduct to conceal adverse material information about the manipulation of LIBOR." Schwab Bank Compl. ¶ 141. Further, defendants' fraudulent conduct included:

> the making of, or participation in the making of, untrue statements of material facts and omitting to state material facts necessary to make Defendants' statements during the Relevant Period – including their representations that the rates of the securities Defendants sold to Plaintiffs were based on LIBOR – in the light of the circumstances under which they were made, not misleading.

Id. ¶ 142. In sum, defendants' conduct constituted a "deceit upon the purchasers of the subject securities during the Relevant Period, including Plaintiffs." *Id.*

While we acknowledge that some of these allegations track statutory provisions, nevertheless, the allegations are of a factual nature and must, of necessity, have been based on factual positions. Fairly read, these allegations plainly indicate that defendants made misleading statements to plaintiffs, likely in the offering materials themselves but, at any rate, certainly "in connection with" defendants' sale of LIBOR-based securities to plaintiffs. While it is true that the allegations are not conclusive admissions and thus may be rebutted by plaintiffs, *see Tran v. Alphonse Hotel Corp.*, 281 F.3d 23, 32 (2d Cir. 2002), *overruled on other grounds by Slayton v. Am. Express Co.*, 460 F.3d 215 (2d Cir. 2006), plaintiffs' attempt to

rebut them is unconvincing. Although plaintiffs now assert that the offering materials did not contain misrepresentations and generally were not misleading, they do not deny that the offering materials omitted the fact that LIBOR was being manipulated. Indeed, for plaintiffs to deny this would be absurd: plaintiffs' argument that they "rel[ied] on the accuracy of LIBOR when [they] entered into the purchases," Tr. 87, requires the conclusion that the offering materials omitted the alleged material fact that LIBOR was being manipulated.

In light of the allegations in plaintiffs' original and amended complaints, it seems clear that the offering materials defendants sent plaintiffs contained either material misrepresentations or material omissions. Moreover, the remaining two elements of securities fraud have also been alleged. Without question, plaintiffs have alleged that defendants acted with scienter, or "intent to deceive, manipulate, or defraud, or knowing misconduct." *SEC v. Boock*, 2011 WL 3792819, at *21 (S.D.N.Y. Aug. 25, 2011) (quoting *In re Carter-Wallace, Inc. Sec. Litig.*, 220 F.3d 36, 39 (2d Cir. 2000)). For instance, the amended complaint alleges that the offering materials were sent "for the purpose of obtaining money from [holders of LIBOR-based financial instruments] through 'false or fraudulent pretenses, representations, or promises.'" *Id.* ¶ 224; *see also id.* ¶ 225. Finally, the material misrepresentations or omissions in the offering materials sent to plaintiffs were clearly made in connection with the purchase or sale of securities. Therefore, the mailings and wires by which defendants offered LIBOR-based securities to plaintiffs could, at a

minimum, have been the subject of a securities fraud action brought by the SEC.

Additionally, all of defendants' misrepresentations to the BBA would likely be grounds for a securities fraud claim by the SEC. First, plaintiffs allege that among the wire communications sent by defendant in furtherance of their fraudulent scheme were "phony statements about their costs of borrowing." Schwab Bank Am. Compl. ¶ 225. These statements, which apparently refer to the wires that defendants sent daily to the BBA, would clearly be material misrepresentations. *See* Schwab Opp'n 9; Tr. 88. Second, plaintiffs have explicitly alleged scienter. Schwab Bank Am. Compl. ¶ 225.

Finally, defendants' "phony statements" to the BBA, under plaintiffs' own construct, would qualify as having been made "in connection with" the purchase or sale of securities. Even if plaintiffs did not rely on each defendant's LIBOR quote in deciding to purchase LIBOR-based securities, it is sufficient that "the scheme to defraud and the sale of securities coincide[d]." *Seippel v. Jenkens & Gilchrest P.C.*, 341 F. Supp. 2d 363, 373 (S.D.N.Y. 2004) (quoting *SEC v. Zandford, 535 U.S. 813, 820 (2002))* (internal quotation mark omitted). Far from being "independent events," *id.* at 374 (quoting *Zandford*, 535 U.S. at 820), defendants' scheme to defraud and their sale of securities to plaintiffs were "closely dependent on each other," *id.* Indeed, one of the alleged reasons why defendants "transmit[ted] phony statements about their costs of borrowing" to the BBA was in order to "obtain[] money from holders of LIBOR-based financial

instruments through 'false or fraudulent pretenses, representations, or promises' about LIBOR-based financial instruments." Schwab Bank Am. Compl. ¶ 225; *see also id.* ¶ 5 (alleging that one of defendants' "primary reasons" for engaging in their fraudulent scheme was that "artificially suppressing LIBOR allowed Defendants to pay lower interest rates on LIBOR-based financial instruments that Defendants sold to investors, including [plaintiffs], during the Relevant Period").

Although defendants' misrepresentations to the BBA may have been intended in part to facilitate defendants' sale of non-security instruments, it remains the case, given that certain of the LIBOR-based financial instruments that defendants sought to sell to plaintiffs were securities, that a significant part of the alleged reason for *all* of defendants' misrepresentations to the BBA was to defraud purchasers of securities. In short, because defendants' alleged misrepresentations to the BBA were allegedly made for the purpose of profiting unfairly from their sale of securities to plaintiffs, defendants' misrepresentations to the BBA were made "in connection with" the sale of securities. Therefore, all of defendants' alleged misrepresentations to the BBA would be grounds for a securities fraud action brought by the SEC.[20]

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[20] It is of no avail to plaintiffs that they allege that they "do not base their RICO claim[] on any conduct that would have been actionable as fraud in the purchase or sale of securities." Schwab

Plaintiffs argue that even if their RICO claim may not rely on predicate acts that would have been grounds for a securities fraud suit, the claim should survive to the extent it involves predicate acts that would not have been actionable as securities fraud. Schwab Opp'n 5-7. Such predicate acts might include communications offering non-security financial instruments.

Plaintiffs' argument is inconsistent with how courts have consistently applied the RICO Amendment. Specifically, where plaintiffs allege "a single scheme," courts have held that "if any predicate act is barred by the PSLRA it is fatal to the entire RICO claim." *Ling v. Deutsche Bank*, No. 04 CV 45662005, 2005 WL 1244689, at *4 (S.D.N.Y. May 26, 2005).

For example, in *Gilmore v. Gilmore*, No. 09 Civ. 6230, 2011 WL 3874880, at *4 (S.D.N.Y. Sept. 1, 2011), "[plaintiff]'s RICO claims [were] based on his allegations that [defendant] and [defendant's outside financial and investment advisor] engaged in a multi-year scheme to defraud him and his siblings by looting the family companies through self-dealing, fraudulent

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Bank Am. Compl. ¶ 227. First, this is a legal conclusion that we need not accept as true. Second, regardless of whether plaintiffs are correct that they could not have brought a private action for securities fraud based on the alleged RICO predicate acts, those predicate acts could, as discussed above, have been the basis for a securities fraud action brought by the SEC. This is sufficient for plaintiffs' RICO claim to be barred under the PSLRA's RICO Amendment.

securities transactions, and overbilling." *Id.* at *2. The Court held that defendant's alleged plots to loot the family companies "count[ed] as a single scheme." *Id.* at *6. Therefore, "the securities aspects of the fraud [needed to] be aggregated with the non-securities aspects." *Id.* In other words, having alleged that defendant's acts "were part of a single fraudulent scheme[,] the [plaintiff] [could not] divide the scheme into its various component parts," as "such surgical presentation . . . would undermine the Congressional purpose" behind the RICO Amendment. *Id.* (quoting *Seippel v. Jenkens & Gilchrest, P.C.*, 341 F. Supp. 2d 363, 373 (S.D.N.Y. 2004)). Because there was "no genuine dispute that components of Plaintiffs alleged action could have been brought under the securities laws," the Court dismissed plaintiff's RICO claims. *Id.*

Similarly, in *Ling v. Deutsche Bank*, 2005 WL 1244689, the Court dismissed RICO claims based on a fraudulent scheme to offer illegitimate tax strategy advice where "[f]or at least some of the[] individual Plaintiffs, the sale of securities was necessary to effectuate the tax strategy." *Id.* at *6. Because "the Plaintiffs contend[ed] the wrongful acts were committed as part of a single fraudulent scheme, all of the components [needed to] be considered together for securities fraud purposes." *Id.* at *4.

Here, the PSLRA bars plaintiffs' RICO claim despite the fact that certain of the alleged predicate acts might not have been actionable as securities fraud. Plaintiffs have unambiguously alleged that defendants' conduct constituted a single fraudulent scheme. See, e.g., Schwab Bank Am. Compl. ¶ 219

(alleging that defendants formed an association-in-fact enterprise with the "common purpose" of "using [their] false quotes to cause the BBA to set LIBOR artificially low, thereby allowing Defendants to increase their net interest revenues by making artificially low payment to investors such as [plaintiffs]"). Because they have done so, and because some of the alleged predicate acts could have been grounds at least for a securities fraud action brought by the SEC, plaintiffs' RICO claim, in its entirety, is barred by the PSLRA.

3. Extraterritoriality

Apart from being barred by the PSLRA's RICO Amendment, plaintiffs' RICO claim rests on an impermissible extraterritorial application of the RICO statute. This provides an independent basis for dismissing plaintiffs' RICO claim.

a. RICO's Reach

As discussed above, *Morrison v. National Australia Bank Ltd.*, 130 S. Ct. 2869 (2010), establishes a two-part test for deciding extraterritoriality questions. First, "'unless there is the affirmative intention of the Congress clearly expressed' to give a statute extraterritorial effect, 'we must presume it is primarily concerned with domestic conditions.'" *Id.* at 2877 (quoting *EEOC v. Arabian American Oil Co.* ("*Aramco*"), 499 U.S. 244, 248 (1991)). "When a statute gives no clear indication of an extraterritorial application, it has none." *Id.* at 2878. With regard to RICO, the Second Circuit has established that "RICO is silent as to any extraterritorial application." *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 32 (2d Cir. 2010)

(citing *N.S. Fin. Corp. v. Al-Turki*, 100 F.3d 1046, 1051 (2d Cir. 1996)) (internal quotation marks omitted); *see also Mitsui O.S.K. Lines, Ltd. v. Seamaster Logistics, Inc.*, 871 F. Supp. 2d 933, 937 (N.D. Cal. 2012) ("Since *Morrison* made it clear that the presumption against extraterritoriality is a canon of construction applicable to any statute, a half-dozen courts have applied its reasoning in the RICO context. These courts have uniformly held that RICO is silent as to its extraterritorial application and that, under *Morrison*, it therefore has none."). Therefore, RICO does not apply extraterritorially.[21]

Second, if a statute applies only domestically, a court must determine which domestic conduct the statute regulates by reference to "the 'focus' of congressional concern." *Morrison*, 130 S. Ct. at 2884 (quoting *Aramco*, 499 U.S. at 255). With regard to RICO, some courts have found that the statute focuses on the enterprise. *See, e.g. Cedeno v. Intech Group, Inc.*, 733 F. Supp. 2d 471, 474 (S.D.N.Y. 2010) ("[T]he focus of RICO is on the enterprise as the recipient of, or cover for, a pattern of criminal activity. . . . RICO does not apply where, as here, the alleged enterprise and the impact of the predicate activity upon it are entirely foreign."); *see also Mitsui*, 871 F. Supp. 2d at

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[21] It is irrelevant whether the statutes prohibiting the alleged predicate acts apply extraterritorially. *See Norex*, 631 F.3d at 33 ("*Morrison* similarly forecloses [plaintiff]'s argument that because a number of RICO's predicate acts possess an extraterritorial reach, RICO itself possesses an extraterritorial reach.").

938 ("[C]ourts have broadly agreed that . . . in the RICO context 'it is the "enterprise" that is the object of the statute's solicitude, and the "focus" of the statute.'" (quoting *European Cmty. v. RJR Nabisco, Inc.*, No. 02-CV-5771 (NGG) (VVP), 2011 WL 843957, at *5 (E.D.N.Y. Mar. 8, 2011))).

By contrast, other courts have found that RICO focuses "on the pattern of racketeering activity and its consequences." *Chevron Corp. v. Donziger*, 871 F. Supp. 2d 229, 245 (S.D.N.Y. 2012); *see also id.* at 242 (reasoning that "foreign enterprises have been at the heart of precisely the sort of activities – committed in the United States – that were exactly what Congress enacted RICO to eradicate," and concluding that Congress probably was concerned with "the conduct of the affairs of foreign enterprises through patterns of racketeering activity, at least if the prohibited activities injured Americans in this country and occurred here, either entirely or in significant part"). The Second Circuit has not decided this issue. *See Cedeno v. Castillo*, 457 F. App'x 35, 37 (2d Cir. 2012).

We agree with the Court in *Cedeno* that the focus of RICO is on the enterprise. In any RICO complaint, each of the predicate acts would be actionable independently, criminally and possibly also civilly. *See* 18 U.S.C. § 1961(1) (defining "racketeering activity"). The additional element that elevates isolated criminal acts to a RICO violation is the involvement of an enterprise, either as a passive victim of racketeering activity or as an active mechanism for perpetrating the racketeering activity. Indeed, the Supreme Court has held that the two primary purposes of RICO are to

"protect[] a legitimate 'enterprise' from those who would use unlawful acts to victimize it," *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 164 (2001) (citing *United States v. Turkette*, 452 U.S. 576, 591 (1981)), and to "protect[] the public from those who would unlawfully use an 'enterprise' (whether legitimate or illegitimate) as a 'vehicle' through which 'unlawful . . . activity is committed,'" *id.* (quoting *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 259 (1994)); *see also European Cmty.*, 2011 WL 843957, at *5 (reasoning that RICO "does not punish the predicate acts of racketeering activity . . . but only racketeering activity in connection with an 'enterprise,'" and that the statute "seeks to regulate 'enterprises' by protecting them from being victimized by or conducted through racketeering activity"). As the *Cedeno* Court reasoned, "RICO is not a recidivist statute designed to punish someone for committing a pattern of multiple criminal acts[, but rather] prohibits the use of such a pattern to impact an enterprise." *Cedeno*, 733 F. Supp. 2d at 473. Therefore, we conclude that Congress's focus in enacting RICO was the enterprise. Under Morrison, a RICO enterprise must be a "domestic enterprise." *European Cmty.*, 2011 WL 843957, at *5.

b. The Location of the Alleged RICO Enterprise

To determine where an enterprise is located, courts have employed the "nerve center" test, adopted from the Supreme Court's use of that test in *Hertz Corp. v. Friend*, 130 S. Ct. 1181 (2010), to locate a corporation's principal place of business for purposes of

diversity jurisdiction. *See, e.g., European Cmty.*, 2011 WL 843957, at *5-6; *see also Mitsui*, 871 F. Supp. 2d at 940 ("The nerve center test provides a familiar, consistent, and administrable method for determining the territoriality of RICO enterprises in cases such as the one at bar, which blend domestic and foreign elements."). As articulated in *Hertz*, the "nerve center" of a corporation is "the place where a corporation's officers direct, control, and coordinate the corporation's activities." *Hertz*, 130 S. Ct. at 1192. In the RICO context, courts have found that although "RICO enterprises . . . may not have a single center of corporate policy," the test is nonetheless useful in focusing on the "brains" of the enterprise - where its decisions are made - as opposed to its "brawn" - where its conduct occurs. *European Cmty.*, 2011 WL 843957, at *6.

Here, for obvious reasons, plaintiffs resist the most natural way to apply RICO to the factual circumstances, namely to identify the BBA as the enterprise and to allege that the BBA's LIBOR-setting process had been corrupted by defendants and used to carry out a pattern of racketeering activity. Because the BBA is plainly a foreign enterprise, such a construct would result in an impermissible extraterritorial application of RICO. Therefore, plaintiffs have alleged that the enterprise is an association in fact whose members are the BBA panel banks, and their affiliates, and whose purpose is to submit artificially low LIBOR quotes to the BBA so that LIBOR is fixed at artificially low levels and the defendants profit on LIBOR-based financial instruments. Tr. 95; Exchange Am. Compl. ¶ 219. This

strikes us as a strained attempt by plaintiffs to plead around an obvious defect in their theory.

Even evaluating plaintiffs' construct of an association-infact enterprise on its merits, the enterprise would be foreign. In locating the enterprise, the nerve center test, despite its usefulness in other cases, has little value here. The decisionmaking of the alleged enterprise likely occurred in several different countries, and might even have been located in each of the countries in which a defendant was headquartered. *See* Schwab Bank Am. Compl. ¶¶ 20-35 (identifying the countries of defendants' headquarters as the United States, England, Japan, the Netherlands, Switzerland, Germany, Canada, and Scotland). Plaintiffs have not alleged that defendants met in any one physical location in furtherance of their fraudulent scheme; rather, they have alleged that "Defendants used the mails and wires in conjunction with reaching their agreement to make false statements about their costs of borrowing, to manipulate LIBOR." Schwab Bank Am. Compl. ¶ 226. Indeed, if plaintiffs are correct that defendants joined together to fix LIBOR over the course of several years, it would seem highly improbable that defendants physically met in one location to discuss the scheme. Therefore, because the decisionmaking in furtherance of the alleged scheme would likely have occurred in many countries, the "nerve center" test does not point us to a single location.

Given that the location of the enterprise's "brain" is indeterminate, we will consider the location of the enterprise's "brawn," or where the enterprise acted.

The alleged fraudulent scheme essentially comprised two parts: (1) the defendants' submission of artificial LIBOR quotes to the BBA, and (2) each defendant's sale of LIBOR-based financial instruments to its customers. The first part involves joint action: the defendants allegedly agreed to coordinate their LIBOR submissions such that they would each submit an artificially low quote to the BBA each day. Indeed, giving the formula for calculating LIBOR, the only way to have a significant effect on the final LIBOR fix is through coordinated, collective action. The second part, by contrast, is independent: even if all of the defendants had a common interest in a low LIBOR fix, each defendant acted independently in selling LIBOR-based financial instruments to its customers.

In locating a RICO enterprise based on its activities, it makes sense to focus on activities done collectively. As discussed above, the focus of Congressional concern in enacting RICO was the RICO enterprise; in the context of an association-in-fact enterprise, the focus is not each defendant's independent commission of predicate acts, but rather the association of defendants together to commit predicate acts. Therefore, based on defendants' collective submission of false LIBOR quotes to the BBA, we find that the alleged RICO enterprise is located in England. The defendants were each members of the BBA, an entity based in England, and participated in the affairs of the BBA by submitting quotes each day to the BBA. In other words, the

collective action of defendants centered on the BBA. As the BBA is located in England, the most sensible place to locate the RICO enterprise is England.[22]

Because RICO applies only to domestic enterprises, and because the enterprise alleged here was located abroad, plaintiffs' claim involves an impermissible extraterritorial application of U.S law. Accordingly, plaintiffs' RICO claim is dismissed.

D. State-Law Claims

At least one state-law cause of action is asserted in the OTC amended complaint, the Schwab amended complaints, and the exchange-based plaintiffs' amended complaint. For the reasons stated below, we decline to exercise supplemental jurisdiction over the state-law claims in the OTC amended complaint and the Schwab amended complaints, with the exception of

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[22] Even if we considered the second stage of the alleged fraud - each defendant's sale of LIBOR-based financial instruments to its customers - we would not necessarily locate the enterprise in the United States. Contrary to plaintiffs' argument, Tr. 97, the fact that only U.S. customers have brought suit pursuant to RICO does not indicate that defendants in fact targeted their sale of LIBOR-based instruments at the U.S. Because LIBOR is a reference point around the world, *id.*, it seems likely that defendants, which are headquartered around the world, would have sold LIBOR-based financial instruments to plaintiffs around the world. Consequently, even if we focused on where defendants sold LIBOR-based instruments, our analysis would not necessarily point to the United States. Furthermore, given that the first stage of the alleged fraud clearly centered on England, the indeterminate location of the second stage reinforces our conclusion that the alleged RICO enterprise was located abroad.

the Schwab plaintiffs' claim pursuant to the Cartwright Act. The Cartwright Act claim and the exchange-based plaintiffs' state-law claim are dismissed with prejudice.

1. OTC Amended Complaint

The OTC amended complaint asserts a cause of action for unjust enrichment and restitution, without stating which state's common law it seeks to apply. OTC Am. Compl. ¶¶ 227-30. The only other cause of action asserted the amended complaint is for violation of section 1 of the Sherman Act, *id.* ¶¶ 220-26, and, as discussed above, we are dismissing this claim for failure to allege antitrust injury. Thus, the question before us is whether we should exercise supplemental jurisdiction over the state common law claim in light of the fact that no federal causes of action remain.[23]

Under 28 U.S.C. § 1367, "district courts may decline to exercise supplemental jurisdiction over a

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[23] Although it is conceivable that we could retain jurisdiction over this claim by virtue of diversity of citizenship, we need not consider this ground because plaintiffs have not pled it. "It is the plaintiff's burden to plead and prove subject matter jurisdiction." *Moses v. Deutche Bank Nat. Trust Co.*, No. 11-cv-5002 (ENV) (VVP), 2012 WL 2017706, at *1 (E.D.N.Y. June 5, 2012) (citing *Standard Chartered Bank Malaysia Holdings v. Lehman Bros. Asia Holdings Ltd.*, No. 08 CV 8152, 2008 WL 4355355, at *1 (S.D.N.Y. Sept. 22, 2008)). Here, plaintiffs have not pleaded that this Court has diversity jurisdiction over their state law claim, nor have they alleged facts that would support our exercise of diversity jurisdiction. Therefore, if we have jurisdiction over plaintiffs' state-law claim, it is not by virtue of diversity of citizenship.

[state law claim] if - . . . (3) the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c) (2006). In *Kolari v. New York-Presbyterian Hosp.*, 455 F.3d 118 (2d Cir. 2006), the Second Circuit held that "[o]nce a district court's discretion is triggered under [section] 1367(c)(3), it balances the traditional 'values of judicial economy, convenience, fairness, and comity' in deciding whether to exercise jurisdiction." *Id.* at 122 (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988)) (internal citation omitted). "In weighing these factors, the district court is aided by the Supreme Court's additional guidance in [*Carnegie-Mellon University v. Cohill*, 484 U.S. 343,] that 'in the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims.'" *Kolari*, 455 F.3d at 122 (alteration in original) (quoting *Cohill*, 484 U.S. at 350 n.7). Indeed, as the Supreme Court explained in *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), *superseded by statute*, 28 U.S.C. § 1367, "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *Id.* at 726.

Here, considerations of judicial economy, convenience, fairness, and comity suggest that we should decline to exercise supplemental jurisdiction over plaintiffs' as-yet-unspecified-state-law claim. First, given that discovery has not yet commenced, it would not significantly compromise judicial economy for another court to start afresh on plaintiffs' state law

claim. Second, in light of the early stage of the proceedings, it would not be particularly inconvenient for plaintiffs to refile their amended complaint in state court. Third, considerations of fairness suggest that plaintiffs' state-law claim would best be decided in state court. Finally, comity to the States counsels us not to decide unnecessarily a question of state law. In sum, we find that in this case, as in "the usual case in which all federal-law claims are eliminated before trial," the *Cohill* factors "point toward declining to exercise jurisdiction over the remaining state-law claims." *Kolari*, 455 F.3d at 122 (quoting *Cohill*, 484 U.S. at 350 n.7) (internal quotation mark omitted). Accordingly, we decline to exercise supplemental jurisdiction over the OTC plaintiffs' state-law claim.

2. Schwab Amended Complaints

The Schwab amended complaints assert four causes of action pursuant to California state law: (1) violation of the Cartwright Act, Schwab Bank Am. Compl. ¶¶ 238-44, (2) interference with economic advantage, *id.* ¶¶ 245-49, (3) breach of the implied covenant of good faith, *id.* ¶¶ 250-55, and (4) unjust enrichment, *id.* ¶¶ 256-63. With regard to each of these claims other than the Cartwright Act claim, the same considerations of judicial economy, convenience, fairness, and comity that counsel us to decline to exercise supplemental jurisdiction over the OTC plaintiffs' state-law claim also counsel us to decline to

exercise supplemental jurisdiction here.[24] In light of the early stage of the proceedings, there is no reason why a California court should not decide plaintiffs' California common law claims.

With regard to plaintiffs' cause of action for violation of the Cartwright Act, the *Cohill* factors suggest a different result. As discussed earlier, California courts interpreting the Cartwright Act have required plaintiffs to satisfy the same antitrust injury requirement that federal courts have applied in the context of the Sherman and Clayton Acts. *See Flagship Theatres of Palm Desert, LLC v. Century Theatres, Inc.*, 198 Cal. App. 4th 1366, 1378, 1380 (App. 2d Dist. 2011) ("[F]ederal case law makes clear that the antitrust injury requirement also applies to other federal antitrust violations [beyond anticompetitive mergers]. California case law holds that the requirement applies to Cartwright Act claims as well. . . . [T]he antitrust injury requirement means that an antitrust plaintiff must show that it was injured by the anticompetitive aspects or effects of the defendant's conduct, as opposed to being injured by the conduct's neutral or even procompetitive aspects."). Therefore, our decision that plaintiffs have failed to

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[24] Like the OTC plaintiffs, the Schwab plaintiffs do not allege that we have diversity jurisdiction, nor do they allege facts that would support our exercise of diversity jurisdiction. *See* Schwab Bank Am. Compl. ¶ 14; Schwab Money Am. Compl. ¶ 14; Schwab Bond Am. Compl. ¶ 14. Therefore, we need not consider whether we have jurisdiction over plaintiffs' state-law claims by virtue of diversity.

allege an antitrust injury applies equally to their Cartwright Act claims.

In these circumstances, considerations of judicial economy, convenience, fairness, and comity suggest that we should exercise supplemental jurisdiction over plaintiffs' Cartwright Act claims. First, as a matter of judicial economy, because our analysis of antitrust injury in the federal context is also sufficient to dispose of plaintiff's Cartwright Act claims, there is no reason for another court to duplicate our efforts. Second, with regard to the parties' convenience, although it would be easy for plaintiffs to refile their claim in state court, it would also be an unnecessary burden for defendants to relitigate an issue that has already been decided here. Third, although fairness to the parties often suggests that issues of state law should be decided by courts of that state, there is nothing unfair about our deciding the issue of antitrust injury in the context of the Cartwright Act given that this requirement is directly based on the federal antitrust injury requirement. Finally, because California has chosen to streamline its Cartwright Act jurisprudence with federal antitrust law to the extent that California courts have endorsed the federal requirement of antitrust injury, there are not strong considerations of comity here in favor of deferring to California courts.

Therefore, we will exercise supplemental jurisdiction over plaintiffs' Cartwright Act claims. As discussed above, plaintiffs must show an antitrust injury to recover under the Cartwright Act, yet here,

plaintiffs have failed to do so. Accordingly, plaintiffs' Cartwright Act claims are dismissed.

3. Exchange-Based Plaintiffs' Amended Complaint

The exchange-based plaintiffs assert a cause of action pursuant to New York law for "restitution/disgorgement/unjust enrichment." Exchange Am. Compl. ¶¶ 250-53.[25] As discussed above, plaintiffs' CEA claims will, in part, survive defendants' motion to dismiss. Plaintiffs have alleged that their state-law claim is also properly before us pursuant to our diversity jurisdiction and supplemental jurisdiction, and defendants have not disputed this. Defendants have, however, moved to dismiss plaintiffs' state-law cause of action for failure to state a claim. Exchange MTD 29-31.

Under New York law, "'[t]he theory of unjust enrichment lies as a quasi-contract claim' and contemplates 'an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties.'" *Georgia Malone & Co., Inc. v. Rieder*, 19 N.Y.3d 511, 516 (2012) (quoting *IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 N.Y.3d 132, 142 (2009)). In order to state a claim for unjust enrichment, a plaintiff must allege that "(1) the

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[25] Although the amended complaint does not specify which state's law the plaintiffs are seeking to apply, the parties have assumed for purposes of briefing that the claim is asserted pursuant to New York common law. Accordingly, we will analyze this claim under New York law.

other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." *Id.* (quoting *Mandarin Trading Ltd. V. Wildenstein*, 16 N.Y.3d 173, 182 (2011) (internal quotation mark omitted).

Given that unjust enrichment is a claim in quasi-contract, it requires some relationship between plaintiff and defendant: "while 'a plaintiff need not be in privity with the defendant to state a claim for unjust enrichment,' there must exist a relationship or connection between the parties that is not 'too attenuated.'" *Id.* (quoting *Sperry v. Crompton Corp.*, 8 N.Y.3d 204, 215-16 (2007)). Where plaintiff and defendant "simply had no dealings with each other," their relationship is "too attenuated." *Georgia Malone*, 19 N.Y.3d at 517-518.

Here, the relationship between plaintiffs and defendants, to the extent that there was any relationship, is surely too attenuated to support an unjust enrichment claim. Although plaintiffs have alleged that they "purchased standardized CME Eurodollar futures contracts" and that "Defendants . . . manipulated and directly inflated CME Eurodollar futures contract prices to artificially high levels," Exchange Am. Compl. ¶¶ 214-15, they have not alleged that they purchased Eurodollar contracts from defendants or that they had any other relationship with defendants. In other words, even if plaintiffs are correct that "the direct and foreseeable effect of the Defendants' intentional understatements of their LIBOR rate was to cause Plaintiffs and the Class to

pay supra-competitive prices for CME Eurodollar futures contracts," *id.* ¶ 217; *see also* Exchange Opp'n 36, this does not establish a relationship, of any sort, between plaintiffs and defendants. *Cf. In re Amaranth Natural Gas Commodities Litig.*, 587 F. Supp. 2d 513, 547 (S.D.N.Y. 2008) ("Plaintiffs have alleged that their losses were caused by defendants' market manipulations . . . . But they have not alleged any direct relationship, trading or otherwise, between themselves and [defendants]. The alleged link between plaintiffs and defendants - from defendants' manipulations to the general natural gas futures market to plaintiffs' trades - is too attenuated to support an unjust enrichment claim.").

Because plaintiffs have not alleged any relationship between themselves and defendants, they fail to state a claim for unjust enrichment under New York law. Accordingly, plaintiffs' unjust enrichment claim is dismissed.

IV. Conclusion

For the reasons stated above, defendants' motions to dismiss are granted in part and denied in part. First, defendants' motion to dismiss plaintiffs' federal antitrust claim is granted. Regardless of whether defendants' conduct constituted a violation of the antitrust laws, plaintiffs may not bring suit unless they have suffered an "antitrust injury." An antitrust injury is an injury that results from an anticompetitive aspect of defendants' conduct. Here, although plaintiffs have alleged that defendants conspired to suppress LIBOR over a nearly three-year-long period and that they were injured as a result, they have not alleged

that their injury resulted from any harm to competition. The process by which banks submit LIBOR quotes to the BBA is not itself competitive, and plaintiffs have not alleged that defendants' conduct had an anticompetitive effect in any market in which defendants compete. Because plaintiffs have not alleged an antitrust injury, their federal antitrust claim is dismissed.

Second, defendants' motion to dismiss plaintiffs' commodities manipulation claims is granted in part and denied in part. Contrary to defendants' arguments, plaintiffs' claims do not involve an impermissible extraterritorial application of the CEA, and plaintiffs have adequately pleaded their claims. However, certain of plaintiffs' claims are time-barred because numerous articles published in April and May 2008 in prominent national publications placed plaintiffs on notice of their injury. Therefore, plaintiffs' commodities manipulation claims based on contracts entered into between August 2007 and May 29, 2008, are time-barred. However, plaintiffs' claims based on contracts entered into between April 15, 2009, and May 2010 are not time-barred, and plaintiffs' claims based on contracts entered into between May 30, 2008, and April 14, 2009, may or may not be barred, though we will not dismiss them at this stage. Additionally, because the Barclays settlements brought to light information that plaintiffs might not previously have been able to learn, we grant plaintiffs leave to move to amend their complaint to include allegations based on such information, provided that any such motion addresses the concerns raised herein and is

accompanied by a proposed second amended complaint.

Third, defendants' motion to dismiss plaintiffs' RICO claim is granted. For one, the PSLRA bars plaintiffs from bringing a RICO claim based on predicate acts that could have been the subject of a securities fraud action. Here, the predicate acts of mail and wire fraud underlying plaintiffs' RICO claim could have been the subject of a claim for securities fraud. Additionally, RICO applies only domestically, meaning that the alleged "enterprise" must be a domestic enterprise. However, the enterprise alleged by plaintiffs is based in England. For these reasons, plaintiffs' RICO claim is dismissed.

Finally, plaintiffs' state-law claims are all dismissed, some with prejudice and some without. Plaintiffs' Cartwright Act claim is dismissed with prejudice for lack of antitrust injury. The exchange-based plaintiffs' New York common law unjust enrichment claim is also dismissed with prejudice, as plaintiffs have not alleged any relationship between them and defendants. With regard to the remaining state-law claims, we decline to exercise supplemental jurisdiction and therefore dismiss the claims without prejudice.

We recognize that it might be unexpected that we are dismissing a substantial portion of plaintiffs' claims, given that several of the defendants here have already paid penalties to government regulatory agencies reaching into the billions of dollars. However, these results are not as incongruous as they might seem. Under the statutes invoked here, there are

many requirements that private plaintiffs must satisfy, but which government agencies need not. The reason for these differing requirements is that the focuses of public enforcement and private enforcement, even of the same statutes, are not identical. The broad public interests behind the statutes invoked here, such as integrity of the markets and competition, are being addressed by ongoing governmental enforcement. While public enforcement is often supplemented by suits brought by private parties acting as "private attorneys general," those private actions which seek damages and attorney's fees must be examined closely to ensure that the plaintiffs who are suing are the ones properly entitled to recover and that the suit is, in fact, serving the public purposes of the laws being invoked. Therefore, although we are fully cognizant of the settlements that several of the defendants here have entered into with government regulators, we find that only some of the claims that plaintiffs have asserted may properly proceed.

SO ORDERED.

/s/ Naomi Reice Buchwald
NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
March 29, 2013

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In re: LIBOR-Based Financial Instruments Antitrust Litigation.
THIS DOCUMENT RELATES TO: All Cases

11 MD 2262 (NRB)
August 23, 2013, Decided
August 23, 2013, Filed

MEMORANDUM AND ORDER

I. Introduction

On March 29, 2013, we issued a Memorandum and Order granting in part and denying in part defendants' motions to dismiss plaintiffs' complaints (the "March 29 Order"). *In re LIBOR-Based Fin. Instruments Antitrust Litig.* (*Mar. 29 Order*), No. 11 MD 2262 (NRB), 2013 U.S. Dist. LEXIS 45909, 2013 WL 1285338 (S.D.N.Y. Mar. 29, 2013). Specifically, we dismissed plaintiffs' antitrust and RICO claims in full; we dismissed plaintiffs' commodities manipulation claims to the extent they were based on contracts entered into between August 2007 and May 29, 2008; and, we allowed plaintiffs' commodities manipulation claims to the extent they were based on contracts entered into between May 30, 2008, and May 2010.[1]

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[1] In ruling on plaintiffs' commodities manipulation claims, we trifurcated the Class Period (as defined in the plaintiffs'

Finally, we dismissed with prejudice the exchange-based plaintiffs' state-law claim for unjust enrichment and declined to exercise supplemental jurisdiction over the remaining state-law claims.

Since the issuance of the March 29 Order, the parties have filed a number of motions. First, the exchange-based plaintiffs have moved for certification of the March 29 Order for interlocutory appeal on the question of whether LIBOR is the commodity underlying Eurodollar futures contracts ("plaintiffs' motion for interlocutory appeal"). Second, three defendants, Bank of Tokyo-Mitsubishi UFJ, Ltd. ("BTMU"), Credit Suisse Group AG ("Credit Suisse"), and Norinchukin Bank ("Norinchukin") have moved for reconsideration of that portion of our Memorandum and Order denying their motion to dismiss the exchange-based plaintiff's commodity manipulation claims ("defendants' motion for reconsideration"). Third, the over-the-counter ("OTC"), bondholder, and exchange-based plaintiffs have each moved for leave to file a second amended complaint to add allegations in

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complaints then before us) into three periods: August 2007 through May 29, 2008 ("Period 1"), May 30, 2008, through April 14, 2009 ("Period 2"), and April 15, 2009, through May 2010 ("Period 3"). *Mar. 29 Order*, 2013 WL 1285338, at *34-*36. We found that the Commodity Exchange Act ("CEA")'s statute of limitations barred plaintiffs' claims to the extent they were based on contracts entered into during Period 1, but did not bar plaintiffs' claims based on contracts entered into during Period 3. *Id.* With regard to claims based on contracts purchased during Period 2, we declined to dismiss plaintiffs' claims because we "[were] not in a position to address" the issues bearing on whether those claims were timely. *Id.* at *35.

response to our ruling that plaintiffs had not plausibly alleged antitrust injury ("plaintiffs' motion to amend their antitrust claims").[2] Finally, the exchange-based plaintiffs have moved for leave to file a second amended complaint to add allegations relating to their commodity manipulation claims ("plaintiffs' motion to amend their commodities manipulation claims").

For the reasons stated below, the exchange-based plaintiffs' motion for interlocutory appeal is denied; the OTC, bondholder, and exchange-based plaintiffs' motions to add allegations with respect to antitrust are denied; the exchange-based plaintiffs' motion to add allegations with respect to trader-based manipulation is denied; BT-MU, Credit Suisse, and Norinchukin's motion for reconsideration is denied without prejudice to a similar motion being filed by defendants that addresses the issues raised herein; and, the OTC plaintiffs' motion for leave to reassert their unjust enrichment claim and to add a claim for breach of the implied covenant of good faith and fair dealing is granted.

Because the background of this case has been thoroughly set out in the March 29 Order, we will proceed directly to our consideration of the pending motions.

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[2] The motion to amend filed by the OTC plaintiffs also seeks leave (1) to add an allegation that we have jurisdiction under the Class Action Fairness Act ("CAFA") over the OTC plaintiffs' state-law claims, (2) to reassert the previously pleaded claim for unjust enrichment, which we dismissed without prejudice due to lack of subject matter jurisdiction, and (3) to advance a new claim for breach of contract.

II. Discussion

A. Plaintiffs' Motion for Interlocutory Appeal

Plaintiffs have moved for certification of the March 29 Order for interlocutory appeal on the following question: "Whether LIBOR is the 'commodity underlying' the Eurodollar futures contract within the meaning of Section 25(a)(1)(D) of the Commodity Exchange Act ('CEA')." Letter from Christopher Lovell and David E. Kovel to the Court (Apr. 22, 2013) [hereinafter Pls.' Letter Mot. for Interlocutory Appeal].[3] Under 28 U.S.C. § 1292:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals

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[3] In a Memorandum filed on May 3, 2013, we noted that we had received a letter from the exchange-based plaintiffs seeking leave to move for certification of our Memorandum and Order of March 29 for interlocutory appeal, as well as a letter from defendants in opposition. *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MD 2262 (NRB), 2013 WL 1947367, at *2 (S.D.N.Y. May 3, 2013). We further observed that, "[b]ased on the submissions to date, this Court could not enter such a certification." *Id.* Nonetheless, "to give exchange-based plaintiffs a full opportunity to support their position," we permitted plaintiffs to submit a reply submission within two weeks, noting that we would treat plaintiffs' original letter as a letter motion. Plaintiffs submitted their reply on May 20.

> which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order[.]

28 U.S.C. § 1292(b).[4] As the Second Circuit has held: "It is a basic tenet of federal law to delay appellate review until a final judgment has been entered. Section 1292(b)'s legislative history reveals that . . . [this law] is a rare exception to the final judgment rule that generally prohibits piecemeal appeals." *Koehler v. Bank of Bermuda Ltd.*, 101 F.3d 863, 865 (2d Cir. 1996) (citation omitted). Indeed, "only exceptional circumstances [will] justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment," *Aristocrat Leisure Ltd. v. Deutsche Bank Trust Co. Americas*, 426 F. Supp. 2d 125, 127 (S.D.N.Y. 2005) (alteration in original) (quoting *Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 25 (2d Cir. 1990)) (internal quotation marks omitted), and district courts must "exercise great care in making a § 1292(b) certification," *id.* (quoting *Westwood Pharm., Inc. v. Nat'l Fuel Gas Distrib. Corp.*, 964 F.2d 85, 89 (2d Cir. 1992)).

Here, interlocutory appeal is not warranted because there is not "substantial ground for difference of opinion" regarding whether LIBOR is the commodity underlying Eurodollar futures contracts.

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[4] Although section 1292 also authorizes appeals of interlocutory orders in several other situations, none of those situations is present here.

As we explained in the March 29 Order, a Eurodollar futures contract is a futures contract whose "underlying instrument" is a "Eurodollar Time Deposit having a principal value of USD $1,000,000 with a three-month maturity." CME Group, *Eurodollar Futures: Contract Specifications*, http://www.cmegroup.com/trading/interest-rates/stir/eurodollar_contract_specifications.html (last visited August 23, 2013). "Eurodollars are U.S. dollars deposited in commercial banks outside the United States." CME Group, *Eurodollar Futures*, http://www.cmegroup.com/trading/interest-rates/files/IR148_Eurodollar_Futures_Fact_Card.pdf. At settlement, the price of a Eurodollar futures contract "is equal to 100 minus the three-month Eurodollar interbank time deposit rate," which rate is defined as the LIBOR fix on the contract's last trading day. CME Group, *Eurodollar Futures Final Settlement Procedure*, http://www.cmegroup.com/trading/interest-rates/files/finalsettlement-procedure-eurodollar-futures.pdf. Prior to settlement, "the price of a 3-month Eurodollar futures contract is an indication of the market's prediction of the 3-month Dollar LIBOR on [that] date." Settlement Agreement Between Dep't of Justice, Criminal Div., and Barclays (June 26, 2012), Appendix A, ¶ 9, Ex. B, Porpora Decl.

Plaintiffs argue that LIBOR is the commodity underlying Eurodollar futures contracts for purposes of the CEA. But this position is simply implausible. For one, LIBOR is a price index; it is not a "commodity," which the CEA defines to include "all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt in." 7 U.S.C. § 1a(9). Moreover, to call LIBOR a

commodity, one would need to be able to articulate a price of LIBOR independent from LIBOR itself. Plaintiffs have not plausibly done so, and we cannot imagine how they could.

As we reasoned in the March 29 Order, "[t]he only plausible way to characterize the components of a Eurodollar contract is that the underlying commodity is a USD 1,000,000 deposit in a foreign commercial bank with a three-month maturity, and the price of the contract is settled or traded at a value based on LIBOR."[5] *Mar. 29 Order*, 2013 WL 1285338, at *43. Just as the prices of futures contracts based, for example, on gold or copper track the prices of their respective underlying commodities, *see Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 488 (7th Cir. 2002); *Sanner v. Bd. of Trade of City of Chicago*, 62 F.3d 918, 929 (7th Cir. 1995), so the prices of Eurodollar futures contracts track (generally) the prices of three-month U.S. dollar time deposits in foreign banks. In the case of futures based on physical commodities, the correlation of futures contract price with underlying commodity price occurs by virtue of the natural operation of the market. In the case of Eurodollar futures, the correlation occurs because the futures price directly incorporates LIBOR, which is an

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[5] Given that the commodity underlying Eurodollar futures contracts is a USD 1,000,000 deposit in a foreign commercial bank with a three-month maturity, the price of that commodity would be the interest rate charged for the use of such a time deposit. LIBOR, of course, does not correspond to any actual interest rate charged for the use of U.S. dollars, but rather is an index based on the LIBOR panel banks' estimates of the rate at which they would be able to borrow funds.

index intended to represent the average price paid by banks for three-month U.S. dollar time deposits. If, as plaintiffs allege, defendants submitted false LIBOR quotes to the BBA, it would be inaccurate to say that they manipulated the commodity underlying Eurodollar futures contracts or the price of that commodity, thereby affecting Eurodollar futures prices indirectly. Rather, the best characterization of what defendants allegedly did would be that they affected Eurodollar futures prices directly by manipulating the index that was directly incorporated into the formula for those prices.

Contrary to plaintiffs' argument, *see* Pls.' Letter Mot. for Interlocutory Appeal 2, the fact that defendants have described Eurodollar futures contracts as "bets on LIBOR" does not suggest that LIBOR is the commodity underlying those contracts. Every futures contract is a bet. Strictly speaking, however, a futures contract is not a bet on the underlying commodity itself (whatever that might mean). Rather, a futures contract is a bet on which direction the average price for the underlying commodity will move. So also with Eurodollar futures, which are bets on which direction the average interest rate for three-month U.S. dollar time deposits in foreign banks, represented by LIBOR, will move. In short, although it is undoubtedly correct to say that Eurodollar futures contracts are bets on LIBOR, to say this is not to embrace plaintiffs' assertion that LIBOR is a commodity, but rather to acknowledge the obvious fact that LIBOR is a price index.

Plaintiffs also argue that, because Eurodollar futures contracts trade and settle based on LIBOR and do not involve any actual delivery of three-month U.S.

dollar time deposits, those contracts can be manipulated only by manipulating LIBOR, not by manipulating the time deposit market. *See Id.* at 2-3. According to plaintiffs, "[t]he amounts of phantom dollar deposits that are never delivered have no significance whatsoever for purposes of manipulation of Eurodollar futures prices (except as to supply a multiplication unit by which to measure the degree of loss from such manipulation of LIBOR)." Pls.' Reply Mem. of Law in Supp. of Mot. to Certify the Mar. 29, 2013 Order for Interlocutory Appeal Pursuant to 28 U.S.C. § 1292(b), at 8 [hereinafter Pls.' Interlocutory Appeal Reply]. In light of this, plaintiffs contend that the CEA's purposes of deterring and remedying manipulation of the commodities futures markets[6] support a finding that LIBOR is the commodity underlying Eurodollar futures contracts. *Id.*

Although we appreciate the important functions served by the CEA, we do not agree with plaintiffs that the only way to manipulate Eurodollar futures is to manipulate LIBOR directly. When properly calculated, LIBOR reflects the average interest rate for three-month U.S. dollar loans in the London interbank lending market. By manipulating this market, which is a subset of the broader market for three-month U.S. dollar time deposits in foreign banks, an entity would cause LIBOR, and thereby Eurodollar futures prices,

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[6] Further, plaintiffs argue that Congress's specific purpose in adding a cause of action based on manipulation of the price of the commodity underlying futures contracts was to "expand[] the prevention of manipulation and the protection of the integrity of futures contract prices." Pls.' Interlocutory Appeal Reply 8.

to be artificial. Thus, one could plausibly manipulate the price of Eurodollar futures contracts by manipulating the price of foreign three-month U.S. dollar time deposits; one need not manipulate LIBOR directly.

Finally, not only is plaintiffs' position implausible, but there is no split of authority on this issue which would counsel in favor of certifying our decision for interlocutory appeal. *See Consub Del. LLC v. Schahin Engenharia* Limitada, 476 F. Supp. 2d 305, 309 (S.D.N.Y. 2007) ("The requirement that such a substantial ground [for a difference of opinion] exist may be met when '(1) there is conflicting authority on the issue, or (2) the issue is particularly difficult and of first impression for the Second Circuit." (quoting *In re Lloyd's Am. Trust Funds Litig.*, No. 96 Civ. 1262, 1997 WL 458739, at *5 (S.D.N.Y. Aug. 12, 1997)). The only authority that even arguably supports plaintiffs' claim that LIBOR is the commodity underlying Eurodollar futures contracts consists of a few stray clauses in the Barclays CFTC settlement order stating that LIBOR is "a commodity in interstate commerce" for purposes of sections 9(a)(2) and 6(c) of the CEA. *See* CFTC Barclays Settlement Order (June 27, 2012), at 4, 25-26, Ex. A, Porpora Decl.; *see also* Pls.' Interlocutory Appeal Reply 5-6. However, these stray references do not convince us that there is a substantial ground for difference of opinion.

First, even assuming that LIBOR is "a commodity in interstate commerce" for purposes of sections 9(a)(2) and 6(c) of the CEA, it does not necessarily follow that LIBOR is the commodity underlying Eurodollar futures contracts for purposes of section 22(a). Indeed, section 22(a), the provision of the CEA which

establishes a private right of action for any person "who purchased or sold a [futures contract] or swap if the violation constitutes . . . (ii) a manipulation of the price of any such contract or swap or the price of the commodity underlying such contract or swap," 7 U.S.C. § 25(a)(1)(D), is not even referenced in the CFTC settlement order at issue.

Moreover, to whatever extent the CFTC's "commodity in interstate commerce" language is in tension with our finding that LIBOR is not the commodity underlying Eurodollar futures contracts, such tension is not substantial enough to warrant interlocutory appeal. Although courts generally "defer to an agency's reasonable interpretation of a statute it is charged with administering," *Cuomo v. Clearing House Ass'n, L.L.C.*, 557 U.S. 519, 525 (2009), such deference is not appropriate when the court is "not reviewing an agency rulemaking or adjudication, but only a settlement agreement," *Se. Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316, 1327 (D.C. Cir. 2008) (Silberman, J., concurring). This is especially so when "the agency itself [was] an interested party to the agreement." *Id.* (alteration in original) (quoting *Nat'l Fuel Gas Supply Corp. v. FERC*, 811 F.2d 1563, 1571 (D.C. Cir. 1987)). Here, although we would normally afford deference to the CFTC's interpretation of the CEA, *see Damato v. Hermanson*, 153 F.3d 464, 472 (7th Cir. 1998), we need not defer to statements made in the Barclays settlement order. *See Sec. Investor Protection Corp. v. Stratton Oakmont, Inc.*, 234 B.R. 293, 336 (Bkrtcy. S.D.N.Y. 1999) ("The Second Circuit has clearly held that consent judgments . . . are not the result of actual adjudications on the merits . . . ."); *cf. In re Platinum*

and Palladium Commodities Litig., 828 F. Supp. 2d 588, 594 (S.D.N.Y. 2011) (prohibiting plaintiffs from relying on a CFTC order to plead the "underlying facts of liability" because, "[a]lthough the CFTC Order included certain factual findings, it nevertheless was the product of a settlement between the CFTC and the Respondents, not an adjudication of the underlying issues in the CFTC proceeding"). Therefore, we cannot conclude, based on the references to LIBOR as "a commodity in interstate commerce" in the CFTC's Barclays settlement order, that a substantial ground for difference of opinion exists that would justify interlocutory appeal.

For the foregoing reasons, plaintiffs have not even approached satisfying the requirements of 28 U.S.C. § 1292(b), and their motion for certification of the March 29 Order for interlocutory appeal is denied.

B. Defendants' Motion for Reconsideration

1. Background

Defendants BT-MU, Credit Suisse, and Norinchukin (collectively, the "moving defendants") have moved for reconsideration of that portion of our Memorandum and Order denying their motion to dismiss the exchange-based plaintiff's commodity manipulation claims, on the ground that we improperly found that plaintiffs had adequately pleaded scienter. In the March 29 Order, we held that, although the scienter element of a commodities manipulation claim "may be alleged generally," *Mar. 29 Order*, 2013 WL 1285338, at *37 (quoting Fed. R. Civ. P. 9(b)) (internal quotation marks omitted), plaintiffs must still allege facts that "give rise to a *strong inference* of scienter," *id.* (alteration in original)

(quoting *In re Amaranth Natural Gas Commodities Litig.*, 612 F. Supp. 2d 376, 384 (S.D.N.Y. 2009)) (internal quotation marks omitted). Plaintiffs may demonstrate scienter by, *inter alia*, "alleging facts to show that defendants had both motive and opportunity to commit fraud."[7] *Id.* (quoting *In re Crude Oil Commodity Litig.*, No. 06 Civ. 6677 (NRB), 2007 WL 1946553, at *8 (S.D.N.Y. June 28, 2007)). "Sufficient motive allegations entail concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged." *Id.* (quoting *In re Amaranth Natural Gas Commodities Litig.*, 612 F. Supp. 2d 376, 383 (S.D.N.Y. 2009)) (internal quotation marks omitted). In the case at bar, we found that plaintiffs' allegations of defendants' motive and opportunity were sufficient to demonstrate scienter. *Id.* at *38.

Our conclusion that plaintiffs had adequately pleaded that "defendants stood to gain concrete benefits from manipulating the price of Eurodollar futures contracts," *id.*, was based on plaintiffs'

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[7] Scienter can also be pleaded "by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." *In re Crude Oil Commodity Litig.*, No. 06 Civ. 6677 (NRB), 2007 WL 1946553, at *8 (S.D.N.Y. June 28, 2007) (quoting *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 290-91 (2d Cir. 2006)) (internal quotation mark omitted). However, plaintiffs cannot satisfy this standard. The only alleged action of defendants that might qualify as "conscious misbehavior or recklessness" is their alleged submission of artificial LIBOR quotes to the BBA. However, as discussed below, merely submitting artificial LIBOR quotes does not by itself indicate an intent to manipulate Eurodollar futures contract prices.

allegation that "[d]efendants, through their broker-dealer affiliates actively traded Eurodollar futures and options on those futures during the Class Period." Exchange-Based Pls.' Am. Consol. Class Action Compl. ¶ 218. Plaintiffs' first amended complaint proceeded to list broker-dealer affiliates of certain of the defendants, including Credit Suisse, but not of others, such as BT-MU or Norinchukin. *Id.* Nonetheless, we understood plaintiffs to be alleging that each defendant, through its broker-dealer affiliate, "actively traded Eurodollar futures and options on those futures during the Class Period." *Id.* Whether or not we were correct in our interpretation of the exchange-based plaintiffs' first amended complaint, the exchange-based plaintiffs have since moved for leave to file a second amended complaint that would add, *inter alia*, explicit allegations that Credit Suisse, BT-MU, and Norinchukin, or their respective affiliates, each held or traded Eurodollar futures contracts during the Class Period. *See* Exchange-Based Pls.' Second Am. Consol. Class Action Compl. ¶¶ 459, 467, 479, Ex. A, Revised Kovel Decl. [hereinafter Exchange-Based Pls.' PSAC]. As discussed below, although we will not permit the exchange-based plaintiffs to add all of their proposed new allegations, we do not object to the paragraphs immediately at issue here. Therefore, in addressing the present motion, we understand plaintiffs to have explicitly alleged that each of the moving defendants held or traded Eurodollar futures contracts during the Class Period.

Defendants maintain that such allegations are insufficient to plead scienter. According to defendants, "plaintiffs do not allege any facts to suggest that each (or any) Movant 'took specific actions which exhibited

an actual intent' to manipulate the price of Eurodollar futures contracts or made 'specific communications . . . about any specific plan to cause artificial prices' in that market." Defs.' Mem. of Law in Supp. of Mot. for Reconsideration or Reargument 3 (alteration in original) (quoting *In re Commodity Exchange, Inc., Silver Futures and Options Trading Litig.*, No. 11 Md. 2213 (RPP), 2012 WL 6700236, at *10-*11 (S.D.N.Y. Dec. 21, 2012)). Further, defendants argue, "plaintiffs do not allege whether each Movant was long or short – a fact that is essential to showing that each Movant would have gained 'concrete benefits' from the alleged manipulation of the price of those contracts." *Id.* Finally, although plaintiffs have alleged that defendants held or traded Eurodollar contracts, defendants contend that "[t]he desire to profit from trading such contracts is precisely the kind of general motive possessed by most corporate defendants that is insufficient to adequately allege scienter." *Id.* at 4.

Although we have considered defendants' motion carefully, we are not at present prepared to resolve it because several important issues have not been sufficiently briefed. Thus, we deny defendants' motion for reconsideration without prejudice to a similar motion being filed, by September 20, 2013, which addresses the following concerns.

2. Relevant Authority

In general, courts have held that, to plead scienter, it is insufficient to allege merely "a generalized motive" that could be "imputed to any publicly-owned, for-profit endeavor." *Chill v. Gen. Elec. Co.*, 101 F.3d 263, 268 (2d Cir. 1996). For instance, "[t]he motive to maintain the appearance of corporate

profitability, or of the success of an investment, will naturally involve benefit to a corporation, but does not 'entail concrete benefits.'" *Id.* Also insufficient are a corporation's "desire[for] its stock to be priced highly by the market," *id.* at 268 n.5, or its "desire to maintain the company's credit rating," *id.* at 268 (citing *San Leandro Emergency Med. Grp. Profit Sharing Plan v. Philip Morris Cos., Inc.* 75 F.3d 801, 813-14 (2d Cir. 1996)). Further, allegations that individual defendants "were motivated by a desire to maintain or increase executive compensation" or to "achieve the most lucrative acquisition proposal [for their company]" are inadequate to plead motive. *Kalnit v. Eichler*, 264 F.3d 131, 140-41 (2d Cir. 2001).

With regard to plaintiffs' allegations that defendants were motivated to manipulate Eurodollar futures contract prices because they held positions in that market, the authority cited by defendants raises a serious question regarding whether plaintiffs' allegations are sufficient.[8] Specifically, in *In re Crude*

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[8] In their opposition, plaintiffs argue that "[the Court] could have found and held that the allegations of hundreds of manipulative acts by each Movant, accompanied by competent allegations of that Movant's knowledge of thousands of manipulative acts by other Defendants and the circumstance that Eurodollar futures prices were the inverse of LIBOR, sufficed to give rise to a reasonable inference of manipulative intent." Pls.' Mem. of Law in Opp'n to Defs.' Mot. for Reconsideration or Reargument 6 (citations omitted). We neither so found nor so held. We have never, and do not, accept the notion that intentionally submitting false LIBOR quotes is tantamount to intending to manipulate Eurodollar futures contracts. Indeed, plaintiffs themselves have alleged that one of the primary goals of each defendant in submitting false LIBOR quotes was to protect

Oil Commodity Litigation, No. 06 Civ. 6677 (NRB), 2007 WL 1946553 (S.D.N.Y. June 28, 2007), we held that plaintiffs had failed to plead motive to manipulate crude oil prices where they had alleged that "defendants had a large presence in the crude oil market [and] the NYMEX crude oil futures and options market, and also engaged in the purchase and sale of OTC contracts in crude oil." *Id.* at *8. Similarly, in *In re Commodity Exchange, Inc., Silver Futures and Options Trading Litig.*, No. 11 Md. 2213 (RPP), 2012 WL 6700236 (S.D.N.Y. Dec. 21, 2012), the Court found that plaintiffs had failed to plead defendant's motive to manipulate silver futures contract prices by alleging that defendant was "a large holder of COMEX silver futures contracts, short puts, and options," had engaged in allegedly suspicious trading activity, and made allegedly "'unusual' deliveries of silver between

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the market's perception of that defendant's financial health. Plaintiffs have also alleged that a separate goal was to profit on LIBOR-based trading, which may or may not involve Eurodollar futures contracts. In short, even accepting plaintiffs' allegations that each defendant submitted false LIBOR quotes over a long period of time and was aware that the other defendants were doing the same, those allegations by themselves do not make plausible that defendants intended to manipulate Eurodollar futures contracts. Of course, although defendants were likely aware that submitting artificial LIBOR quotes would affect the Eurodollar market, "[m]ere knowledge that certain actions might have an impact on the futures market is not sufficient to state a private claim under the CEA." *In re Rough Rice Commodity Litig.*, No. 11 C 618, 2012 WL 473091, at *7 (N.D. Ill. Feb. 9, 2012) (citing *Hershey v. Energy Transfer Partners, L.P.*, 610 F.3d 239, 249 (5th Cir. 2010)).

March 2008 and October 2010." *Id.* at *10-*12.[9] To the extent that these cases are analogous to the facts here, they give rise to serious questions regarding whether plaintiffs have adequately pleaded motive.

3. What Plaintiffs Have, and Could Have, Alleged

Complicating the analysis is the fact that, as we were led to understand at oral argument,[10] plaintiffs are operating with significantly limited information. As plaintiffs' counsel informed us, the details of particular trades in Eurodollar futures contracts, including the identity of the transacting parties, are not publicly available. Tr. 20-23.[11] Specifically, according to plaintiffs' counsel, brokers have a fiduciary duty not to disclose the details of their clients' trades, and, although the CFTC publishes aggregated trading data, it is prohibited from publicly

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[9] The Court in *Silver Futures* did not specify whether it was applying the "motive and opportunity" standard for scienter or the "strong circumstantial evidence of conscious misbehavior or recklessness" standard. *Crude Oil*, 2007 WL 1946553, at *8; *see also Silver Futures*, 2012 WL 6700236, at *10-*12.

[10] Significantly, it was not until oral argument that the issues addressed in this section, involving what information plaintiffs could reasonably be expected to know about defendants' Eurodollar futures contract positions, received any meaningful discussion. Given that we anticipate that this issue will inform whether plaintiffs have adequately pleaded scienter, the minimal and belated attention devoted to the issue contributes to our disinclination to rule on whether reconsideration is warranted until we have received further briefing.

[11] Citations to "Tr." refer to the transcript of the oral argument held on August 8, 2013.

identifying the parties to trades. *Id.* Thus, it appears that we cannot reasonably expect plaintiffs, prior to discovery, to have identified the particular contracts and transactions on which the moving defendants allegedly sought to profit. Of course, it is well established that pleading requirements are relaxed where proof of a claim "involve[s] facts solely within the defendant's knowledge." *ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 102 (2d Cir. 2007); *see also DGM Investments, Inc. v. N.Y. Futures Exchange, Inc.*, 265 F. Supp. 2d 254, 264 (S.D.N.Y. 2003) ("Dismissal on the ground that facts within Defendants' knowledge have not yet been proven in the pleading stage is 'particularly inappropriate.'" (quoting *Sam Wong & Son, Inc. v. New York Mercantile Exchange*, 735 F.2d 653, 678 (2d Cir. 1984)).

Indeed, there is yet another layer of uncertainty impeding plaintiffs' ability to plead with specificity. One way of proving motive is to show that a defendant executed a transaction that yielded a concrete benefit to it as the result of the defendant's manipulative conduct. Here, plaintiffs might have shown that a given defendant exited a position in a Eurodollar futures contract such that the defendant profited as a result of the defendant's manipulation. However, pleading with such specificity appears to be impossible at this stage. For one, as discussed above, plaintiffs do not know which positions defendants held or when they exited those positions. Further, plaintiffs are not in a position to demonstrate that the degree of LIBOR artificiality changed over the time that defendants held their positions in such a way that defendants profited by exiting when they did.

To elaborate on the latter point: In their Proposed Second Amended Complaint ("PSAC"), plaintiffs allege that LIBOR was artificial to some degree for all or most of the period from August 2007 through May 2010.[12] Therefore, the mere fact that a defendant exited a position at a time when LIBOR was artificial does not establish that the defendant benefited from manipulation. Rather, the defendant would profit only if LIBOR's degree of artificiality changed over the time that the defendant held its position in a manner that benefited the defendant. Regardless of whether plaintiffs will ever be able to show this, we cannot discern how they could allege it with specificity now. As we reasoned in the March 29 Order, because "[t]he benchmarks referenced by plaintiffs, though generally probative of when LIBOR was at an artificial level, do not indicate precisely at which level LIBOR should have been fixed on any given day," plaintiffs "cannot reasonably be expected to know the spread between LIBOR's 'true' value and its actual level on any given day, let alone how this spread changed over time." *Mar. 29 Order*, 2013 WL 1285338, at *42. Therefore, although it is possible that, after discovery, plaintiffs will be able to point to particular trades by defendants to show that the defendants stood to reap a concrete benefit from their alleged manipulative conduct, we

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[12] Because alleged trader-based manipulation is the basis for plaintiffs' new allegation that the Class Period begins in January 2005 rather than August 2007, and because, for the reasons stated below, we deny the exchange-based plaintiffs leave to add allegations based on such manipulation, we will assume for purposes of the present discussion that the Class Period begins in August 2007.

question whether we can reasonably expect plaintiffs to have alleged that at this stage.

4. Important Issues that Have Not Been Adequately Briefed

In light of the above discussion, there are three issues that concern us. First, putting aside considerations of what information can be reasonably attributed to plaintiffs, have plaintiffs adequately alleged scienter?[13] Second, if the first question is answered in the negative, do plaintiffs' informational handicaps change the result? And, third, if both of the previous questions are answered in the negative, can the analysis reasonably be confined to the moving defendants, or is it equally applicable to all defendants?[14] Because these issues have not been

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[13] As we see it, this question involves at least two subparts. First, as discussed above, there is an issue regarding whether plaintiffs' allegations that defendants held positions in the Eurodollar futures market is sufficient to plead scienter. Second, in light of the fact that the various groups of plaintiffs have alleged several motives of defendants to manipulate LIBOR other than profiting from Eurodollar futures contracts, namely portraying themselves as economically healthier than they actually were and profiting on particular LIBOR-based financial instruments other than Eurodollar futures, what burden do plaintiffs bear in pleading that defendants' actions were actually motivated, at least in part, by their desire to profit on Eurodollar futures? In other words, assuming we find at least one of the non-Eurodollar-based motives to manipulate LIBOR plausible, what showing must plaintiffs make to demonstrate that defendants' LIBOR submissions were, in fact, made with the specific intent to manipulate the price of Eurodollar futures?

[14] At oral argument, defense counsel sought to distinguish the moving defendants from the non-moving defendants by

adequately briefed, we think it would be imprudent, especially in a case of this magnitude, to resolve the present motion without further briefing.

Accordingly, defendants' motion for reconsideration is denied without prejudice to defendants' filing, by September 20, 2013, of a similar motion that addresses the concerns raised herein.

C. Exchange-Based Plaintiffs' Motion to Amend Their Commodities Manipulation Claims

1. Background

In the March 29 Order, we granted the exchange-based plaintiffs leave to move to file a second amended complaint to include allegations based on the day-to-day, trading-based manipulation at issue in the Barclays settlement, that is, manipulation wherein defendants allegedly submitted specific LIBOR quotes in order to benefit particular positions that they held in the Eurodollar futures market.[15] *Mar. 29 Order*, 2013 WL 1285338, at *36. On May 23, plaintiffs filed such a motion, as well as a proposed second amended

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arguing that plaintiffs' allegations of artificial LIBOR submissions are especially weak with respect to the movants and, indeed, that the data cited by plaintiffs actually exculpate them. *See* Tr. 10-15. However, although these arguments might be relevant to whether artificial Eurodollar futures contract prices existed and whether the moving defendants caused those artificial prices, it is unclear how the arguments are relevant to scienter.

[15] We required that "any such motion address[] the concerns raised [in the March 29 Order] and [be] accompanied by a proposed second amended complaint." *Mar. 29* Order, 2013 WL 1285338, at *36.

complaint. Defendants have opposed plaintiffs' motion on the grounds that the proposed amendments are futile, as they are time-barred and fail to state a claim under the CEA. Defs.' Mem. of Law in Opp'n to Exchange-Based Pls.' Mot. for Leave to Amend as to CEA Claims and File the Second Am. Consol. Class Action Compl. [hereinafter Defs.' Opp'n to Mot. to Amend CEA Claims.]. Among defendants' arguments is that plaintiffs have failed to plead that they suffered actual damages. *Id.* at 24-25. We agree that plaintiffs have not adequately alleged that they suffered an injury as a result of defendants' alleged trader-based conduct, and thus plaintiffs lack standing under the CEA to pursue such claims.[16] This ground being sufficient to deny plaintiffs' motion to amend, we do not reach defendants' other arguments.

2. Legal Standard

Under Rule 15(a) of the Federal Rules of Civil Procedure, a second amended complaint may be filed "only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). Although "[t]he court should freely give leave when justice so requires," *id.*, we "ha[ve] discretion to deny leave for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party." *Holmes v. Grubman*, 568 F.3d 329, 334 (2d Cir. 2009) (quoting *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007)). "An amendment to a pleading is

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[16] As discussed below, although loss causation is not an element of a commodities manipulation claim, private plaintiffs must still plead actual damages in order to have standing to bring suit under the CEA.

futile if the proposed claim could not withstand a motion to dismiss pursuant to [Rule] 12(b)(6)." *Lucente v. Int'l Business Machs. Corp.*, 310 F.3d 243, 258 (2d Cir. 2002) (citing *Dougherty v. N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88 (2d Cir. 2002)).

Under Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). To avoid dismissal, a complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Where plaintiffs have not "nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." *Id.* In applying this standard, a court must accept as true all well-pleaded factual allegations and must draw all reasonable inferences in favor of the plaintiff. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (per curiam); *Kassner v. 2nd Ave. Delicatessen, Inc.*, 496 F.3d 229, 237 (2d Cir. 2007). The Court may also "properly consider 'matters of which judicial notice may be taken, or documents either in plaintiff['s] possession or of which plaintiff[] had knowledge and relied on in bringing suit.'" *Halebian v. Berv*, 644 F.3d 122, 130 n.7 (2d Cir. 2011) (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002)).

3. Analysis

As discussed in the March 29 Order, to avoid dismissal, plaintiffs not only must allege the elements of a commodities manipulation claim, but also must show that they have standing to sue. *See Mar. 29 Order*, 2013 WL 1285338, at *37. Under section 25(a) of the CEA, a plaintiff has standing to bring a

commodities manipulation action only if he has suffered "actual damages" as a result of defendant's manipulation. 7 U.S.C. § 25(a)(1). "The term 'actual damages' has been applied by courts in a straightforward manner to require a showing of actual injury caused by the violation." *Ping He (Hai Nam) Co. Ltd. v. NonFerrous Metals (U.S.A.) Inc.*, 22 F. Supp. 2d 94, 107 (S.D.N.Y. 1998), *vacated on other grounds*, 187 F.R.D. 121 (S.D.N.Y. 1999) (ruling that, "[e]ven if [defendant] violated every provision of the CEA or the CFTC rules, under the express language of § 22, [plaintiff] is only authorized to bring suit, and can only recover, for those violations that caused [plaintiff] to suffer 'actual damages'" (quoting 7 U.S.C. § 25(a))).

Here, the exchange-based plaintiffs have not adequately pleaded that they suffered actual damages as a result of the newly alleged trader-based conduct.[17] In contrast to the alleged persistent suppression of LIBOR that was the sole basis for plaintiffs' Amended Consolidated Class Action complaint, the day-to-day, trader-based LIBOR manipulation that is the basis for plaintiffs' new allegations was episodic and varying in direction. That is, it consists of a number of discrete instances of allegedly false LIBOR submissions, and those submissions were, at times, artificially high and, at other times, artificially low. *See, e.g.* Exchange-Based Pls.' PSAC ¶¶ 183-217. To plead actual damages based on such manipulation, plaintiffs would need to

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[17] We would note from the outset that plaintiffs' allegations of trader-based manipulation of three-month USD LIBOR do not implicate every defendant, but rather are essentially confined to Barclays.

allege that the resulting artificiality in LIBOR caused them injury, in light of their trading of Eurodollar futures contracts.

Plaintiffs have failed to meet this burden. In the PSAC, plaintiffs do not include any allegations that make plausible (1) that they transacted in Eurodollar futures contracts on days on which Eurodollar futures contract prices were artificial as a result of trader-based manipulation of LIBOR, or (2) that their positions were such that they were injured.[18] *Cf. In re Energy Transfer Partners Natural Gas Litig.*, No. 4:07-cv-3349, 2009 WL 2633781 (S.D. Tex. Aug. 26, 2009) (requiring plaintiffs, in order to allege actual damages under the CEA, to show an overlap between the time period during which the manipulation occurred and

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[18] Although plaintiffs' argument that "[t]he inquiry on a CEA manipulation claim must be on the existence of artificial prices, not whether prices were artificially high or artificially low," Pls.' Reply Mem. of Law in Supp. of Exchange-Based Pls.' Mot. for Leave to Amend as to CEA Claims and File the Second Am. Consol Class Action Compl. 16, is correct with regard to pleading the elements of a commodities manipulation claim, it is not correct with regard to pleading CEA standing, for which actual damages are required. Whereas a CEA claim brought by the CFTC is focused wholly on defendants' conduct, such that the injury suffered by individual traders is irrelevant, a CEA claim brought by private plaintiffs pursuant to section 25 is focused *both* on defendants' conduct *and* on whether that conduct caused plaintiffs' injury. As seems almost tautological, moreover, the issue of whether plaintiffs were harmed by defendants' alleged manipulative conduct, which caused the price of Eurodollar futures contracts to be either artificially high or artificially low, must turn, at least in part, on whether plaintiffs' positions were such that plaintiffs were benefited by the manipulation or harmed by it.

the period during which plaintiffs traded their contracts). Indeed, despite the fact that plaintiffs indisputably have access to their own Eurodollar futures contract trading records, the PSAC is devoid of any references to particular Eurodollar contracts.[19] *See* Tr. 38-41, 45. Rather than plead with such specificity, plaintiffs have simply alleged that each of the named plaintiffs "traded on-exchange based products tied to LIBOR such as Eurodollar futures" during the Class Period, Exchange-Based Pls.' PSAC ¶¶ 20-27, and that the members of the proposed class "transacted in Eurodollar futures and options on Eurodollar futures on exchanges such as the CME [during the Class Period] and were harmed by Defendants' manipulation of LIBOR," *id.* ¶ 502. However, because the alleged trader-based manipulation did not occur on every day of the Class Period, but rather on only a subset of those days – a subset that plaintiffs can, at least in part, identify – and because the alleged manipulation on any given day went in a particular direction – a direction which, again, plaintiffs can, at least in part, identify[20] – and thus would have harmed only those

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[19] At oral argument, plaintiffs' counsel stated that, while plaintiffs could have alleged the particular Eurodollar contracts they traded, they did not do so because they did not think it necessary. Tr. 50. We are skeptical that plaintiffs' motivation for failing to identify their particular Eurodollar futures contracts was in fact so innocent. At any rate, for the reasons set forth herein, which we note cannot come as any great surprise to plaintiffs' counsel, we reject the notion that it is unnecessary here to plead the particular contracts on which plaintiffs were allegedly harmed.

[20] Although "plaintiffs could not have known the 'true' level of any LIBOR quote[and thus] could not have pleaded, consistent

entities with certain positions, the broad allegations plaintiffs have offered are insufficient to allege actual damages.

To elucidate this point, we can contrast plaintiffs' persistent suppression theory, where we found plaintiffs' pleading sufficient, with their trader-based manipulation theory, where we do not. In evaluating the persistent suppression allegations in plaintiffs' first amended complaint, we did not require plaintiffs to allege the specific days on which they traded because LIBOR, and consequently Eurodollar futures prices, was allegedly artificial throughout the Class Period. Here, by contrast, the proposed trader-based claims, even if accepted, would entail only that LIBOR was artificial for certain discrete days during the Class Period, and thus the allegation that plaintiffs traded during the Class Period is insufficient to show that plaintiffs suffered actual damages. With regard to alleging plaintiffs' positions, we relaxed the requirement in the persistent suppression context because plaintiffs could not be expected to know how LIBOR compared to "true LIBOR" on any given day (as opposed to whether LIBOR was artificial on average over a period of time). In the trader-based manipulation context, however, the Barclays allegations suggest, for at least some of the days on

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with Rule 11, precisely which quotes were inaccurate and by how much," *Mar. 29 Order*, 2013 WL 1285338, at *39, the Barclays settlements reveal, for at least some of the days on which Barclays' alleged trader-based manipulation occurred, in which direction LIBOR was manipulated (and thus which positions would have been harmed).

which manipulation occurred, in which direction LIBOR deviated from "true LIBOR." Thus, whereas we could not expect plaintiffs to allege how their specific positions were negatively affected by persistent suppression of LIBOR, we can expect plaintiffs to allege how their positions were negatively affected by trader-based manipulation.

Contrary to plaintiffs' assertion, *see* Pls.' CEA Reply 17, this analysis does not involve an application of the loss causation principles established in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005). As we explained in the March 29 Order, *Dura* established that "where plaintiffs' injury results from defendants' dissemination of false information, 'an inflated purchase price will not itself constitute or proximately cause the relevant economic loss.'" *Mar. 29 Order*, 2013 WL 1285338, at *40 (quoting *Dura*, 544 U.S. at 342). Interpreting the cases decided in the wake of *Dura*, we concluded:

> [I]f the manipulation alleged here is analogous to isolated artificial stock purchases, we can presume that plaintiffs suffered damages based on an inflated purchase price [because we can presume that the artificiality dissipated soon after plaintiffs' purchase]. If, however, the manipulation is more akin to disseminating inaccurate information, plaintiffs need to show that they sold or settled their Eurodollar contracts at a loss [because we cannot presume that artificiality resulting from inaccurate information will dissipate on its own].

Id. We found that persistent suppression "is less like isolated manipulative activity and more like disseminating false information." *Id.* at *41. To the

extent that they assert claims based on persistent LIBOR suppression, therefore, plaintiffs will be required to show that they sold their Eurodollar contracts at a loss; at the pleading stage, we found their allegations sufficient in light of their limited access to information. *See id.* at 41-42.

By contrast, the trader-based conduct described in the Barclays settlement documents falls squarely in the category of isolated (though repeated) manipulative activity. As such, we can presume that the effect of the manipulation dissipated, *see id.* at *40, and plaintiffs need only allege that they engaged in a transaction at a time during which prices were artificial as a result of defendants' alleged trader-based manipulative conduct, and that the artificiality was adverse to their position. As discussed above, however, plaintiffs have not even alleged this.

Finally, although plaintiffs asserted at oral argument that the trader-based manipulation was sufficiently frequent to render the Eurodollar futures market artificial for the duration of the Class Period, Tr. 27-28, 46-52, this claim is not supported by the facts. As alleged in the PSAC: "[b]etween January 2005 and May 2009, at least 173 requests for USD-LIBOR submissions were made to Barclays' Submitters." Exchange-Based Pls.' PSAC ¶ 195. Of these 173 requests, 111 were made between January 3, 2006, and August 6, 2007. *Id.* The United Kingdom Financial Services Authority ("FSA") found that, of these 111 requests, "on around 70% of those occasions, the submissions were consistent with the traders' request." *Id.* ¶ 196. Although plaintiffs have not alleged how frequently the remaining 62 requests affected LIBOR submissions, we can assume the 70%

rate here, as well. Thus, plaintiffs' allegations indicate the following: between January 2005 and May 2009, 121 LIBOR submissions were artificial as a result of trader-based manipulation; between January 3, 2006, and August 6, 2007, 78 were; and, between August 7, 2007, and May 2009, at most 43 were.

Assuming that there are roughly 250 trading days per year,[21] we can calculate the approximate frequency of trader-based manipulation during the Class Period. Between January 2005 and May 2009, LIBOR submissions were artificial roughly 11% of the time; in the narrower period between January 3, 2006, and August 6, 2007, submissions were artificial roughly 20% of the time; and, between August 7, 2007, and May 2009, LIBOR was artificial, at most, roughly 10% of the time. Taking these numbers at face value, we cannot say that the alleged trader-based manipulation was so constant that plaintiffs adequately plead actual damages by alleging merely that they traded during the Class Period. Moreover, there is no indication that the alleged manipulation was evenly spaced throughout the relevant time periods; given the

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[21] In 2013, the CME Group recognized 11 holidays. CME Group, CME Group Holiday Calendar, http://www.cmegroup.com/tools-information/holiday-calendar/ (last visited Aug. 23, 2013). Assuming roughly 104 weekend days per year, there are 250 days on which Eurodollars futures contracts could be traded on the CME. (We recognize that "[o]n CME Group recognized holidays, open outcry trading and CME Globex trading observe different opening and closing times, depending on markets traded," *id.*, and that our calculation of 250 trading days is a simplification. Nonetheless, it will do for present purposes.)

possibility that the manipulation was concentrated in certain weeks or months, it is even less likely that plaintiffs' generalized allegations demonstrate actual damages.

To whatever extent the foregoing analysis has failed to discredit plaintiffs' pleading of actual damages, a footnote in the FSA's report delivers the coup de grâce. Explaining its methodology for calculating 173 requests between January 2005 and May 2009, the FSA stated:

> If more than one request was contained in the same communication, these have been counted separately. For example, a request for a "high 3 month and low 6 month" would be counted as two requests. A request for a "high 3 month for the next two days" would also be counted as two requests. A request for "high" or "low" submissions which did not specify a particular maturity would be counted as three requests (for one month, three month and six month submissions) unless the context of the communication indicates otherwise.

FSA Barclays Final Notice (June 27, 2012), ¶ 56(i) n.15, Ex. C, Porpora Decl. In other words, although Eurodollar futures contract prices are based solely on 3-month U.S. dollar LIBOR, the FSA included in its analysis requests relating to one-month and six-month LIBOR.[22] Not only does this methodology suggest that

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[22] With regard to the 111 requests between January 3, 2006, and August 6, 2007, the FSA similarly failed to distinguish among different tenors, referring instead simply to "requests . . .

the frequencies calculated above might significantly overstate how often three-month LIBOR was artificial, but it also introduces an indefiniteness into plaintiffs' pleading that precludes their argument that Eurodollar futures prices were artificial for essentially all of the Class Period. Deprived of this argument, plaintiffs cannot justify their failure to show that their trading in Eurodollar futures was such that they suffered actual damages from defendants' alleged misconduct.[23]

4. Conclusion

The exchange-based plaintiffs have not adequately pleaded that they suffered actual damages from defendants' alleged trader-based manipulation of Eurodollar futures contract prices. Therefore, plaintiffs are denied leave to amend their complaint to add allegations of such manipulation. Separately, it appears that the exchange-based plaintiffs are seeking to amend their complaint in other ways relevant to their CEA claims. Among these proposed amendments is their naming of Societe Generale as a defendant, as well as their new allegations stating more explicitly

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relating to US dollar LIBOR submissions." FSA Final Notice (June 27, 2012), ¶ 71(i).

[23] Obviously, we could not expect plaintiffs to connect their trading to instances of manipulative conduct that occurred on dates that are still not publicly available. However, the Barclays settlement documents do identify the dates and circumstances of a number of instances of alleged manipulative conduct. To plead actual damages, plaintiffs would have needed to show that, at least for some of these instances, their Eurodollar futures trading was such that they suffered damages from defendants' conduct.

that (almost) every defendant, or its affiliate, traded in Eurodollar futures contracts. These proposed amendments do not appear to be opposed. Accordingly, the exchange-based plaintiffs shall submit, by September 10, 2013, a version of the PSAC that contains only those allegations consistent with the holdings herein.

Finally, we would note that defendants advanced arguments in opposing plaintiffs' motion to amend that appear to be aimed at seeking reconsideration of our March 29 Order. Specifically, whereas we had dismissed only those "persistent suppression" claims based on contracts entered into during "Period 1," from August 2007 through May 29, 2008, defendants seem to be arguing now that we should also dismiss "persistent suppression" claims based on contracts entered into at other times. Whether or not this was defendants' intention, we are not prepared to dismiss claims we previously declined to dismiss based on arguments contained in an opposition to a motion to amend. If defendants intend to seek reconsideration of our March 29 Order on statute of limitations grounds, or intend to submit a renewed motion to dismiss regarding "Period 2" claims, they may move for leave to file such a motion by September 20, 2013.

D. Plaintiffs' Motion to Amend Their Antitrust Claims

In the March 29 Order, we dismissed plaintiffs' antitrust claims because plaintiffs failed to plead antitrust injury and thus lacked standing to bring claims pursuant to the Clayton Act. *See Mar. 29 Order*, 2013 WL 1285338, at *10-*19. In response, the OTC, exchange-based, and bondholder plaintiffs have

moved to amend their respective complaints, principally to add allegations addressed to antitrust injury.

As discussed above, although "[t]he court should freely give leave [to amend] when justice so requires," Fed. R. Civ. P. 15(a)(2), we "ha[ve] discretion to deny leave [to amend] for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party." *Holmes v. Grubman*, 568 F.3d 329, 334 (2d Cir. 2009) (quoting *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007)). "An amendment to a pleading is futile if the proposed claim could not withstand a motion to dismiss pursuant to [Rule] 12(b)(6)." *Lucente v. Int'l Business Machs. Corp.*, 310 F.3d 243, 258 (2d Cir. 2002) (citing *Dougherty v. N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 88 (2d Cir. 2002)).

For the two independent reasons discussed below, plaintiffs' motion for leave to amend is denied.

1. Given the Circumstances of this Case, Amendment Would Not Be Proper

In light of the history and circumstances of this case, justice does not require us to afford plaintiffs yet another opportunity to amend. Each of plaintiffs' first amended complaints[24] asserted a cause of action for violation of section 1 of the Sherman Act. These amended complaints, which ranged in length from 211 to 253 paragraphs, resulted from the consolidation of

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[24] For purposes of the present analysis, we do not address the complaints filed by the Schwab plaintiffs, who have not sought leave to replead.

twenty original complaints, and were filed following a fierce competition for appointment as class counsel. Indeed, our decision appointing class counsel reflected that we had then been persuaded that all of the firms competing to be class counsel "have extensive experience in complex litigation," "have adequate knowledge of the applicable law," "would each devote significant resources to prosecuting plaintiffs' claims," and, finally, "have demonstrated that they have thoroughly investigated the relevant claims." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MD 2262 (NRB), 2011 WL 5980198, at *3 (S.D.N.Y. Nov. 29, 2011). We appointed Hausfeld and Susman Godfrey as interim class counsel for the OTC plaintiffs and Kirby McInerney and Lovell Stewart as interim class counsel for the exchange-based plaintiffs, *id.at *4*; the bondholder plaintiffs, who filed later, are represented by Weinstein Kitchenoff & Asher and Morris & Morris. In short, the allegations in the first amended complaints not only drew on the work of twenty sets of plaintiffs and plaintiffs' counsel, but also presumably represented the best efforts of six highly experienced firms to state a viable claim.

At the time that the first amended complaints were filed, it was widely projected that damages in this case might reach billions of dollars. *See* Mark Gongloff, *Libor Scandal May Cost Banks $35 Billion: Study*, Huffington Post (July 17, 2012), http://www.huffingtonpost.com/2012/07/17/libor-scandal-costbanks_n_1680764.html; Halah Touryalai, *Libor Lawsuits Are Piling Up and Could Cost Billions, Banks Brace for Another Big Legal Battle*, Forbes (July 12, 2012), http://www.forbes.com/sites/halahtouryalai/2012/07/12/liborlawsuits-are-piling-up-

and-could-cost-billions-banks-brace-foranother-big-legal-battle/; Alistair Osborne, *Banks Face Crippling Libor Litigation Costs: Britain's Banks Face Costs Running into Tens of Billions of Pounds from the Libor Scandal if US Litigants Prove They Were the Victims of Four Years of Mispricing, City Experts Have Warned*, Telegraph (June 28, 2012), http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/9363260/Banks-face-crippling-Libor-litigation-costs.html; *see also* OTC Pls.' Consol. Am. Compl. ¶ 6 ("By acting together and in concert to knowingly understate their true borrowing costs, Defendants caused LIBOR to be calculated or suppressed artificially low, reaping hundreds of millions, if not billions, of dollars in ill-gotten gains.").

In sum, given the competition to become interim lead counsel, which revealed the experience of the competitors; the number of original complaints that had been filed; and, the obvious motivation to craft sustainable first amended complaints containing all factual and legal allegations that supported plaintiffs' claims, the Court was entitled to rely on these pleadings to contain the strongest possible statement of plaintiffs' case based on the collective skills of plaintiffs' counsel.

The subject of plaintiffs' motions to amend, namely antitrust injury, figured prominently in the case after the filing of the first amended complaints, being presented clearly and repeatedly as a flaw in the pleading of plaintiffs' complaints. In their motion papers filed on June 29, 2012, defendants argued that plaintiffs' amended complaints should be dismissed because, *inter alia*, they failed to allege antitrust injury. *See* Mem. of Law in Supp. of Defs.' Mot. to

Dismiss Pls.' Antitrust Claims 26-27. Although plaintiffs thereafter submitted a letter to the Court on August 1, 2012, seeking leave to amend, primarily on the basis of information contained in the Barclays settlements, there was no indication in plaintiffs' letter that the proposed amendments would bolster plaintiffs' allegations of antitrust injury. When plaintiffs perfunctorily reiterated their request for leave to amend in their opposition to defendants' motion to dismiss the antitrust claims, they again did not indicate that new allegations would remedy any previous defects regarding antitrust injury. *See* Pls.' Joint Mem. of Law in Opp'n to Defs.' Mot. to Dismiss Pls.' Antitrust Claims 36-38, 52-53. Finally, the issue of antitrust injury featured prominently in the oral argument held on March 5, 2013, and a concession by plaintiffs' counsel that the LIBOR-setting process is not competitive was the topic of significant discussion. Yet, despite being squarely on notice that the Court considered antitrust injury a serious and, indeed, threshold issue, plaintiffs did not seek to amend their complaint to strengthen their pleading of antitrust injury until after we issued the 161-page March 29 Order.[25]

Whatever might be the appropriate result in other cases, here, justice does not require us to permit plaintiffs to file a second amended complaint. Indeed, just the opposite. This is surely a case in which "the defendants and the Court were entitled to the plaintiffs' best effort at presenting their claims in

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[25] That decision followed briefing that exceeded 330 pages (exclusive, of course, of complaints and declarations).

response to the objections raised by the defendants." *In re Eaton Vance Mut. Funds Fee Litig.*, 403 F. Supp. 2d 310, 318 (S.D.N.Y. 2005). Further, it would be unacceptable to allow plaintiffs, after failing to seek to amend their complaints with regard to antitrust injury in response to defendants' motion and after tremendous effort was expended by defendants and the Court in considering and ruling on the motions to dismiss, to seek to plug the holes in their complaints identified by the March 29 Order. Plaintiffs "[are] not entitled to an advisory opinion from the Court informing them of the deficiencies of the complaint and then an opportunity to cure those deficiencies." *Id.* (quoting *PR Diamonds, Inc. v. Chandler*, 364 F.3d 671, 699 (6th Cir. 2004) (internal quotation marks omitted). Indeed, to permit amendment here might have the perverse effect of turning defense counsel and the Court into plaintiffs' counsel's co-counsel, with plaintiffs waiting to see what objections defendants raise and how the Court rules on those objections and then amending their complaint as necessary based on what they learned in the process. Especially in a case of this magnitude, with so much at stake and with enormous expenditure of resources by defendants and the Court, that is an unacceptable way to operate a system of justice. Nor is this a situation, as with pro se parties, where either plaintiffs or their counsel (who will, if they prevail, seek to have their fees paid by defendants) are deserving of any special solicitude.

Finally, it must emphasized that essentially none of the allegations plaintiffs put forward with regard to antitrust injury rest on new facts that plaintiffs could not have pleaded before. Indeed, after receiving plaintiffs' letter of August 1, 2012, we permitted

plaintiffs to rely on the Barclays settlement documents in opposing defendants' motions to dismiss, and, although settlements involving UBS and RBS have since come to light, these settlements do not advance plaintiffs' antitrust injury argument in any way that the Barclays settlement did not. Plaintiffs' new antitrust injury allegations mostly involve reframing previously known facts in an attempt to remedy the defects we identified on the fundamental issue of antitrust standing.

2. Plaintiffs' Proposed Amendments Would Be Futile

Even if we did not find plaintiffs' effort to amend their complaints for a second time with regard to antitrust standing to be wholly unwarranted in these circumstances, we would deny them leave to amend because the proposed amendment would be futile. Specifically, even taking into account plaintiffs' proposed allegations, plaintiffs do not adequately plead antitrust injury.

The issue of antitrust injury was thoroughly examined in the March 29 Order, and we stand by our reasoning in that opinion. As we stated there, antitrust injury is an injury "attributable to an anticompetitive aspect of the practice under scrutiny." *Mar. 29 Order*, 2013 WL 1285338, at *11 (quoting *Atl. Richfield Co. v. USA Petroleum Co.* ("*ARCO*"), 495 U.S. 328, 334 (1990)) (internal quotation marks omitted). The injury "should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation," *id.* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)), and it must involve "loss [that] stems from a

competition-*reducing* aspect or effect of the defendant's behavior," *id.* (quoting *ARCO*, 495 U.S. at 344).

Here, after careful review of the allegations in plaintiffs' proposed second amended complaints, we conclude that none of plaintiffs' new allegations change the outcome reached in the March 29 Order. Plaintiffs' allegations include new ways of packaging previously known facts, such as arguing that the LIBOR-setting rules themselves give rise to competition, and new theories for how defendants compete, such as that they compete over their creditworthiness, that they compete to offer customers the best interest rate benchmark on financial instruments, or that they compete by "keeping other banks honest" and reporting any improper conduct by them. However, regardless of the creativity they display, none of plaintiffs' allegations make plausible that there was an arena in which competition occurred, that defendants' conduct harmed such competition, and that plaintiffs suffered injury as a result. Even where plaintiffs have identified a market in which defendants are, in fact, competitors, they have not plausibly alleged that each defendant failed to act in its independent individual self-interest. In other words, even if we grant that plaintiffs have alleged a vertical effect – that they suffered harm as a result of defendants' conduct – they have not plausibly alleged a horizontal effect – that the process of competition was harmed because defendants failed to compete with each other or otherwise interacted in a manner outside the bounds of legitimate competition.

Therefore, both because amendment would not be proper in the circumstances of this case and because

plaintiffs' new allegations would be futile, plaintiffs are denied leave to amend their antitrust claims.

E. State Law Claims

In their first amended complaint, the OTC plaintiffs asserted a single state-law claim for unjust enrichment and restitution. OTC Pls.' Consol. Am. Compl. ¶¶ 227-30. Because we dismissed the OTC plaintiffs' antitrust claim – their only other asserted claim for relief – we declined to exercise supplemental jurisdiction over their state-law claim.[26] *Mar. 29 Order*, 2013 WL 1285338, at *58-*59.

Since the March 29 Order was issued, plaintiffs have taken the position, despite the fact that they had not previously relied on diversity jurisdiction at all, that subject matter jurisdiction based on the Class Action Fairness Act of 2005 ("CAFA"), in fact, exists. Pls.' Mem. of Law in Supp. of Their Mot. for Leave to File Proposed Consol. Second Am. Compl. 14-15. Defendants agree. *See* Defs.' Mem. of Law in Opp'n to OTC Pls.' Request for Leave to Amend State Law Claims 1 [hereinafter Defs.' State Law Opp'n]. As do we: this is a case in which at least one member of the putative class is diverse from at least one defendant, 28 U.S.C. § 1332(d)(2) (2006); the matter in

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[26] We also noted that, "[a]lthough it [was] conceivable that we could retain jurisdiction over [plaintiffs' state-law] claim by virtue of diversity of citizenship," we did not need to consider this ground for jurisdiction because "plaintiffs ha[d] not pleaded that this Court has diversity jurisdiction over their state law claim, nor ha[d] they alleged facts that would support our exercise of diversity jurisdiction." *Mar. 29 Order*, 2013 2013 WL 1285338, at *58 n.23.

controversy plausibly exceeds the sum of $5,000,000, *id.*; and, the number of members of the proposed plaintiff class exceeds 100, *id.* § § 1332(d)(5)(B). Further, the exceptions to CAFA jurisdiction do not seem to apply. Therefore, we may assert jurisdiction over the OTC plaintiffs' proposed state-law causes of action.

As discussed above, Rule 15(a) provides that a second amended complaint may be filed "only with the opposing party's written consent or the court's leave," though "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). We "ha[ve] discretion to deny leave for good reason, including futility, bad faith, undue delay, or undue prejudice to the opposing party." *Holmes v. Grubman*, 568 F.3d 329, 334 (2d Cir. 2009) (quoting *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 200 (2d Cir. 2007)).

Here, plaintiffs seek to reassert their unjust enrichment claim, Pls.' Second Consol. Am. Compl. ¶¶ 389-92, Ex. A, Pls.' Mem. of Law in Supp. of Their Mot. for Leave to File Proposed Consol. Second Am. Compl. [hereinafter OTC Pls.' PSAC], and to plead a new claim for breach of contract, based primarily on defendants' alleged breach of the implied duty of good faith and fair dealing, *id.* ¶¶ 375-88. Defendants argue that we should deny plaintiffs leave to make these amendments because the amendments are futile and because plaintiffs' delay in seeking to amend is inexcusable.

Unlike in the antitrust context, we do not believe that considerations of bad faith, undue delay, or undue

prejudice to defendants require us to deny plaintiffs leave to amend regarding their state-law claims.[27] For the reasons stated below, moreover, we also do not believe that futility mandates that we deny plaintiffs leave to amend, though our decision is without prejudice to a motion by defendants to dismiss any second amended complaint.

Although we grant plaintiffs' motion, we are concerned that plaintiffs failed to include contract claims in their first amended complaint. Our concern was not alleviated during oral argument, as, despite questioning, no adequate explanation was proffered by plaintiffs' counsel. We note further that this failure has the consequence of further delaying the determination of the contours of the complaint – a delay that obviously is not to plaintiffs' advantage.

1. Unjust Enrichment

Plaintiffs reassert their claim for unjust enrichment, over which we previously declined to exercise jurisdiction. In the March 29 Order, we considered the elements of an unjust enrichment claim in the context of addressing the exchange-based

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[27] We would note that, in their letter to the Court of August 1, 2012, submitted after defendants filed their motions to dismiss but before plaintiffs filed their opposition papers, plaintiffs requested leave to amend to add, *inter alia*, new causes of action. In this respect, plaintiffs' present request to amend is differently situated from their request to add allegations to cure their amended complaint's defects relating to antitrust injury, which plaintiffs did not seek to do, despite being on notice of the issue since at least June 2012, until after we issued the March 29 Order.

plaintiffs state-law claim. As we stated there: "Under New York law, '[t]he theory of unjust enrichment lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties.'" *Mar. 29 Order*, 2013 WL 1285338, at *60 (quoting *Georgia Malone & Co. v. Rieder*, 19 N.Y.3d 511, 516 (2012)). To state a claim for unjust enrichment, a plaintiff must allege that "(1) the other party was enriched, (2) at that party's expense, and (3) that it is against equity and good conscience to permit the other party to retain what is sought to be recovered." *Id.* (quoting *Georgia Malone*, 19 N.Y.3d at 516) (internal quotation mark omitted).

Based on the present record, we cannot conclude that plaintiffs' unjust enrichment claim would be futile. Plaintiffs have alleged that they purchased financial instruments from defendants wherein they paid defendants fixed sums and received in return a floating amount tied to LIBOR. OTC Pls.' PSAC ¶¶ 12-13, 35. Additionally, plaintiffs have alleged that defendants "knowingly understate[d] their true borrowing costs" during the Class Period and thereby "caused LIBOR to be calculated or suppressed artificially low." *Id.* ¶ 5. This conduct allegedly "allowed [defendants] to pay unduly low interest rates to investors, including Baltimore Plaintiffs, on LIBOR-based financial instruments during the Class Period." *Id.* ¶ 8. In short, plaintiffs have alleged that defendants were enriched at their expense by receiving from plaintiffs fixed sums set based on an "accurate" LIBOR, *see id.* ¶ 336, and paying plaintiffs floating amounts that were artificially low due to defendants' alleged manipulation of LIBOR. Further, plaintiffs

plausibly allege that it would be inequitable to permit defendants to retain the rewards they reaped at plaintiffs' expense. Although plaintiffs had entered into their swap agreements with the "expectation that the floating payments [they] would receive over the life of the contract would be calculated based on LIBOR submissions that conformed to the LIBOR definition, an accurate measure of interbank borrowing costs," *id.*, defendants allegedly manipulated LIBOR such that it was fixed at a lower level than it would have been at normally, and thereby paid plaintiffs less than they were entitled to receive. On face, these allegations appear to state a claim for unjust enrichment.

Nonetheless, defendants argue that plaintiffs' claims are barred because their relationships with defendants were governed by contract. Under New York law, the cause of action of unjust enrichment does not lie "where the parties have entered into a contract that governs the subject matter" at issue. *Pappas v. Tzolis*, 20 N.Y.3d 228, 234 (2012) (quoting *Cox v NAP Constr. Co.*, 10 N.Y.3d 592, 607 (2008)) (internal quotation mark omitted). Here, defendants contend that the contracts between plaintiffs and defendants "govern the consideration for the financial instruments [plaintiffs] purchased, and thus their claim for unjust enrichment fails as a matter of law." Defs.' Mem. of Law in Opp'n to OTC Pls.' Request for Leave to Amend State Law Claims 4 [hereinafter Defs.' State Law Opp'n].

We are not convinced. "[T]he predicate for dismissing quasi-contract claims is that the contract at issue 'clearly covers the dispute between the parties.'" *Union Bank, N.A. v. CBS Corp.*, No. 08 Civ. 8362

(PGG), 2009 WL 1675087, at *7 (S.D.N.Y. June 10, 2009) (quoting *Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 389 (1987)); *see also id. at *8* (declining to dismiss unjust enrichment claim where there was a chance that "resolution of th[e] dispute [would] require[] going outside the four corners of the parties' agreements").

Here, although the swap contracts clearly required defendants to pay plaintiffs the prescribed floating rate of return using the LIBOR reported by the BBA, the contracts did not "clearly cover[]" the subject matter now at issue,[28] namely whether defendants were permitted to manipulate LIBOR itself and thereby depress the amount they were required to pay plaintiffs.[29] As such, the existence of plaintiffs' swap

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[28] Defendants surely overreach when they argue that plaintiffs' unjust enrichment claim is barred because the swap contracts govern the subject matter of "the consideration for the financial instruments [plaintiffs] purchased." Defs.' State Law Opp'n 4. If a plaintiff could not assert a claim for unjust enrichment based on any conduct by the defendant that affected the "consideration" the plaintiff received under a contract with the defendant, unjust enrichment claims would effectively be barred whenever a contract between the plaintiff and the defendant existed. Such a result, though possibly to defendants' liking, is not countenanced by New York law.

[29] Importantly, the question we face here is distinct from that we face in deciding whether plaintiffs may add a new claim for breach of the implied duty of good faith and fair dealing. In evaluating whether plaintiffs may add their contract claim, we ask whether plaintiffs have *plausibly* alleged that a duty not to manipulate LIBOR was implicit in the swaps contracts. By contrast, in evaluating whether plaintiffs may reassert their unjust enrichment claim, we ask whether the swaps contracts *clearly* govern whether defendants are permitted to submit

agreements with defendants does not bar plaintiffs' unjust enrichment claim.

Defendants also argue that plaintiffs' pleading of unjust enrichment is insufficient because plaintiffs' allegations do not show that defendants reaped a "net gain" at the expense of plaintiffs' "net loss." *See* Defs.' State Law Opp'n 5-6. In support of this argument, defendants cite *Maryland Casualty Co. v. W.R. Grace and Co.*, 218 F.3d 204 (2d Cir. 2000), which involved a dispute among insurers of a manufacturer of asbestos-containing products, in which insurers who had settled with the manufacturer early on sought reimbursement of covered litigation defense costs from insurers who settled subsequently. *Id.* The earlier-settling insurers had argued that the later-settling insurers had been unjustly enriched because they "simply sat back and waited until the early settling insurers paid amounts that settled [the manufacturer]'s claim for defense costs accruing prior to the [early] settlements." *Id.* at 212.

The Second Circuit rejected this argument. Although the early settlements entered into by plaintiffs forced them to cover the insured's then-incurred defense costs, they also absolved plaintiffs of responsibility for later defense costs, which were far greater, and allowed plaintiffs to pay out their indemnity limits before defense costs sharply escalated. *Id.* at 213. Therefore, "it [could not] be

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artificial LIBOR quotes to the BBA. Apart from how we answer the former question, we answer the latter question in the negative.

determined whether (overall) [plaintiffs] paid more in combined indemnity and defense payments as a result of the non-contribution of [defendants], or whether (overall) [plaintiffs] paid less." *Id.* Combined with the fact that the decision of when to settle was inherently risky and involved some amount of benefit and some amount of harm, the Circuit concluded that defendants had not been unjustly enriched. *Id.*

Maryland Casualty is plainly distinguishable. In that case, the issue was not whether defendants had been unjustly enriched through transactions directly with plaintiffs, but rather whether defendants had paid less than their fair share to the insured manufacturer and therefore should be compelled to reimburse plaintiffs. In light of this, the relevant comparison was necessarily between the overall amount plaintiffs paid the insured, in fact, and the overall amount plaintiffs would have paid had defendants settled earlier. Here, by contrast, plaintiffs entered into swap contracts directly with defendants, and the allegation is that defendants benefited at plaintiffs' expense by paying plaintiffs less on those contracts. *Maryland Casualty* is inapposite to these facts.[30]

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[30] Defendants also argue that plaintiffs have failed to satisfy Rule 9(b)'s requirements of pleading fraud with particularity. We disagree, for substantially the reasons given in the March 29 Order for why the exchange-based plaintiffs had satisfied Rule 9(b). *See Mar. 29* Order,, 2013 WL 1285338, at *39-*40. With regard to the one requirement of Rule 9(b) that is different between the OTC and the exchange-based claims, alleging the effect that defendants' scheme had on the market at issue, here the OTC plaintiffs have alleged, as discussed above, that the

For the foregoing reasons, we are not convinced that the OTC plaintiffs' requested amendment would be futile. Thus, although we do not preclude defendants from moving to dismiss any unjust enrichment claim asserted in a second amended complaint, we will permit plaintiffs to make such an amendment.

2. Breach of the Implied Duty of Good Faith and Fair Dealing

The OTC plaintiffs seek to add a new claim for breach of the implied covenant of good faith and fair dealing.[31] Under New York law, "a covenant of good

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contracts they entered into with defendants paid a floating rate of return based on LIBOR, such that manipulation of LIBOR directly affected defendants' payments on those contracts.

[31] Plaintiffs style this claim: "Breach of Contract and Implied Covenant of Good Faith and Fair Dealing." OTC Pls.' PSAC, at 157. Although plaintiffs focus this claim on breach of the implied duty, they also allege that "Defendants' collusion to manipulate the LIBOR rate also breached the contractual term that provided that Plaintiffs would receive payments that were based on the LIBOR definition." *Id.* ¶ 387. However, plaintiffs have not alleged an explicit term in their swap contracts that required the benchmark used to calculate the floating amount to be based on the LIBOR definition. *See* Tr. 65, 69-71. The contracts' provision that the floating rate would be based on "USD-LIBOR-BBA," OTC Pls.' PSAC ¶¶ 377, 379, though it may give rise to an implied duty, is not such an explicit term. Moreover, given that LIBOR is, by definition, an average of eight banks' submissions to the BBA, no one bank could possibly guarantee that a particular LIBOR fix was determined in a manner that wholly complied with the BBA's rules. Therefore, plaintiffs cannot state a claim for breach of an explicit contractual provision, and our analysis here will focus instead on whether they can state a claim for breach of the implied covenant of good faith and fair dealing.

faith and fair dealing in the course of contract performance" is "[i]mplicit in all contracts." *Dalton v. Educ. Testing Serv.*, 87 N.Y.2d 384, 389 (1995) (citing *Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publ'g Co.*, 30 N.Y.2d 34, 45 (1972)). The implied covenant of good faith and fair dealing obligates a promisor to fulfill "any promises which a reasonable person in the position of the promisee would be justified in understanding were included" in the contract. *Id.* (quoting *Rowe v Great Atl. & Pac. Tea Co.*, 46 N.Y.2d 62, 69 (1978)) (internal quotation marks omitted). Specifically, implied in every contract is a promise that "neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract." *Id.* (quoting *Kirke La Shelle Co. v Armstrong Co.*, 263 N.Y. 79, 87 (1933)) (internal quotation marks omitted); *see also LJL 33rd St. Assocs., LLC v. Pitcairn Properties Inc.*, Nos. 11-5425-cv, 12-1382-cv, 2013 WL 3927615, at *9 (2d Cir. July 31, 2013) ("The implied covenant of good faith and fair dealing bars a party from taking actions 'so directly to impair the value of the contract for another party that it may be assumed that they are inconsistent with the intent of the parties.'" (quoting *Bank of China v. Chan*, 937 F.2d 780, 789 (2d Cir. 1991))). That said, the implied covenant arises "only in connection with the rights or obligations set forth in the terms of the contract," *Paul v. Bank of Am. Corp.*, No. 09-CV-1932 (ENV) (JMA), 2011 WL 684083, at *6 (E.D.N.Y. Feb. 16, 2011); *see also Corazzini v. Litton Loan Servicing LLP*, No. 1:09-CV-0199 (LEK/RFT), 2010 WL 1132683, at *7 (N.D.N.Y. Mar. 23, 2010) ("[T]he implied obligation is in aid and furtherance of other terms of the agreement

of the parties." (quoting *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 304 (1983))), and "cannot create duties that negate explicit rights under a contract," *LJL 33rd St. Assocs.*, 2013 WL 3927615, at *9.

Here, plaintiffs have plausibly alleged that defendants breached the implied covenant good faith and fair dealing. As discussed above, plaintiffs allege that they entered into swap contracts with defendants wherein they paid defendants a fixed rate and received in return a floating rate tied to LIBOR. In entering into these contracts, plaintiffs allege, they expected LIBOR to be set according to its definition, such that it reflected the average interest rate being charged in the London interbank lending market. Such an expectation would have been integral to the "bet" that is one purpose of entering into a swap: each plaintiff, as the party paying a fixed rate and receiving a floating rate, bet that interest rates would rise over the life of the contract, and each defendant, as the party paying a floating rate and receiving a fixed rate, bet that interest rates would fall.[32] By allegedly

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[32] Defendants argue that, for at least some of the plaintiffs, such as the City of Baltimore, the purpose of entering into swap contracts was not to bet on the direction of prevailing interest rates, but rather to hedge against exposure to interest rate fluctuation resulting from other instruments plaintiffs had entered into, with the effect of making plaintiffs floating rate neutral. Tr. 62-63; Defs.' State Law Opp'n 6 n.7; Defs.' Mem. of Law in Supp. of Mot. to Dismiss Pls.' Antitrust Claims 32-33. However, even if this was one of plaintiffs' purposes in entering into the swap contracts, there is no indication that this was any plaintiff's sole purpose; that is, it is not clear that any plaintiff purchased swaps so as to make itself actually floating rate neutral. There is also no indication that this hedging purpose was

manipulating LIBOR downward, such that it was lower than it would have been if set according to its definition, defendants depressed the consideration plaintiffs received pursuant to their contracts and undermined the contractual bargain whereby plaintiffs agreed to pay a certain fixed rate in exchange for receiving a rate that reflected prevailing interest rates. In other words, plaintiffs have alleged that defendants "injur[ed their right] to receive the fruits of the contract," *Dalton*, 87 N.Y.2d at 389 (quoting *Kirke La Shelle*, 263 N.Y. at 87) (internal quotation mark omitted), "so directly . . . impair[ing] the value of the contract for [plaintiffs] that it may be assumed that

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held by every plaintiff. Moreover, even if hedging was any plaintiff's sole purpose in entering into a swap, that does not indicate that the plaintiff sought to be *LIBOR*-neutral, as opposed to *interest-rate*-neutral, generally; in other words, the plaintiff's purpose might have been to receive payments tied to prevailing interest rates, as reflected through LIBOR, in order to hedge exposure to both LIBOR and non-LIBOR rates it was paying on other instruments. Although defendants might be able to establish through discovery that plaintiffs' sole purpose in entering into the swaps was to hedge their exposure to LIBOR, we are not in a position to decide that now. For present purposes, plaintiffs have sufficiently alleged that one of their purposes in entering into the swaps was to profit from receiving a rate that reflected prevailing interest rates. *See, e.g.*, OTC Pls.' PSAC ¶ 336 (alleging that the City of Baltimore entered into the swaps with the "expectation that the floating payments it would receive over the life of the contract would be calculated based on LIBOR submissions that conformed to the LIBOR definition, an accurate measure of interbank borrowing costs"); *id.* ¶ 386 (stating that "the purpose of the contracts" was "to make and receive payments based on a LIBOR rate that is set according to the terms of the LIBOR definition").

[defendants' alleged actions] are inconsistent with the intent of the parties." *LJL 33rd St. Assocs.*, 2013 WL 3927615, at *9 (quoting *Bank of China*, 937 F.2d at 789) (internal quotation marks omitted). Further, an implied duty not to manipulate LIBOR is "in connection with" plaintiffs' explicit contractual right to receive a LIBOR-based rate, and defendants' obligation to pay such a rate, because manipulation of LIBOR would cause the contractual exchange to depart from what the parties intended.[33] Thus, plaintiffs plausibly allege that the duty of good faith and fair dealing implicit in their contracts with defendants included a promise by defendants not to manipulate LIBOR to their benefit and plaintiffs' detriment.

The allegations here are analogous to those in *City of New York v. Coastal Oil New York, Inc.*, No. 96 Civ. 8667 (RPP), 1999 WL 493355 (S.D.N.Y. July 12, 1999). In *Coastal Oil*, the City of New York had a contract with a fuel oil vendor whereby the City purchased fuel oil at variable prices adjusted weekly based on wholesale prices reported in an industry publication. *Id.* The defendant vendor was one of six companies that submitted prices to the publication, *id.* at *3, and, during the life of its contract with the City, submitted artificially high prices to the publication which caused the price paid by the City under the contract to be artificially high. *Id.* at *3-*4. Although the City's contract with the vendor contained "no explicit

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[33] Additionally, of course, an implied duty not to manipulate LIBOR does not "negate explicit rights under [the parties'] contract[s]." *LJL 33rd St. Assocs.*, 2013 WL 3927615, at *9.

agreement . . . regarding the prices that [the vendor] could submit to [the industry publication],"[34] *Id.* at *3, the City brought suit on the theory that the vendor's submission of false wholesale prices constituted a breach of the implied duty of good faith and fair dealing.

The Court held that plaintiffs had raised a genuine issue of material fact precluding summary judgment. Finding that "[t]he purpose of the price adjustment clause . . . [was] to produce a delivered price 'which shall vary with the market . . . according to the method of adjustment," and reasoning that "[t]he delivered price could not vary with market conditions if it was not based on bona fide [published] quotes," the Court concluded that "[t]he artificial manipulation of the [wholesale] price average in [the publication] would prevent the price adjustment clause from accomplishing this essential purpose." *Id.* at *7. By manipulating the wholesale price it reported to the publication, therefore, the vendor breached its implied duty of good faith and fair dealing.

At oral argument, defendants sought to distinguish *Coastal Oil* by arguing that, whereas the purpose of the contract there was clearly frustrated by defendant's conduct, here, the purpose of the swap contracts was merely to pay the LIBOR reported by

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[34] There also was no "written or oral agreement between [the publication] and [the vendor] defining the prices [the vendor] could submit to [the publication]," though the submitted prices were understood to "represent advertised wholesale asking prices for the date listed in [the publication] as the effective date." *Coastal Oil*, 1999 WL 493355, at *3 & n.4.

the BBA, which defendants undeniably did. Tr. 61-67. This distinction, however, is not convincing. Although plaintiffs surely expected to be paid at a rate incorporating reported LIBOR, there is no indication that they wanted this merely for its own sake. Rather, as plaintiffs have plausibly alleged, they expected to be paid at a rate that reflected prevailing interest rates, which LIBOR, as defined, did. Indeed, as discussed above, one of the purposes of entering into a swap is to bet on the direction prevailing interest rates will move,[35] and this purpose is undermined if the interest rate index incorporated into the contractual payment formula is decoupled from the market through the manipulative conduct of defendants. Thus, contrary to defendants' arguments, *Coastal Oil* counsels in favor of granting plaintiffs' motion for leave to amend.

Defendants' additional arguments also fail to convince us that plaintiffs should be denied leave to amend. Although defendants reprise their contention that plaintiffs have not shown a net loss based on LIBOR suppression in light of their overall exposure to LIBOR, *see* Defs.' State Law Opp'n 10, this argument is even weaker than it was in the unjust enrichment context, given that, here, our focus is squarely on the individual contracts on which plaintiffs received a floating rate tied to LIBOR and therefore were

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[35] For the reasons discussed above, although defendants argue that plaintiffs entered into the swap contracts not to bet on the direction interest rates would move, but rather to hedge their exposure to LIBOR fluctuation, we cannot conclude, on the present record, that this was any plaintiff's sole purpose in entering into the swaps.

allegedly harmed when LIBOR was artificially reduced. Further, even if "the implied covenant of good faith will not be breached without some showing of intent to harm the other contracting party or a reckless disregard of it," *Paul v. Bank of Am. Corp.*, No. 09-CV-1932 (ENV) (JMA), 2011 WL 684083, at *6 (E.D.N.Y. Feb. 16, 2011), plaintiffs here have plausibly alleged that defendants' alleged manipulation of LIBOR was at least in reckless disregard of the detriment to plaintiffs, with whom defendants were in direct contractual privity. Finally, despite defendants' argument that plaintiffs' contract claim is unsuited to class treatment and that "the implausibility of certification weighs heavily against permitting the belated addition of a breach of contract claim," Defs.' State Law Opp'n 11 (failing to cite any authority for this proposition), we do not think that class certification concerns require us to deny the present motion. Regardless of whether plaintiffs will ultimately be able to prevail on a class certification motion, the propriety of class treatment does not bear on our decision whether to permit plaintiffs to add their contract claim.

Defendants have not demonstrated that plaintiffs' proposed contract claim would be futile. As with plaintiffs' unjust enrichment claim, therefore, although we do not preclude defendants from moving to dismiss any contract claim asserted in a second amended complaint, we grant plaintiffs leave to add such a claim.

F. Stay of Actions Not Subject to the Prior Motions to Dismiss

On August 14, 2012, we issued a Memorandum and Order imposing a stay on all complaints not then subject to defendants' motions to dismiss. *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MD 2262 (NRB), 2012 WL 3578149 (S.D.N.Y. Aug. 14, 2012). On May 3 of this year, we issued a Memorandum in which we stated: "The stay shall remain in place for now with respect to cases that raise issues addressed in our Memorandum and Order [of March 29, 2013]. If there are any complaints that do not raise any such issue, please advise." *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MD 2262 (NRB), 2013 WL 1947367, at *2 (S.D.N.Y. May 3, 2013). In response to that invitation, we have received a number of letters from plaintiffs seeking to lift the stay on their cases. Having reviewed those letters, and in light of the conclusions in the present Memorandum and Order and the fact that the legal landscape of this case, though substantially clarified, is still in somewhat of a state of flux, we think the most prudent course of action is to maintain the stay on all actions previously subject to it. Further, given the magnitude of this multi-district litigation and the fact that the universe of actions encompassed by it continues to expand, we are wary of addressing the individual cases piecemeal rather than comprehensively. Therefore, all actions not subject to defendants' previously filed motions to dismiss shall

continue to be stayed, pending further order of the Court.[36]

III. Conclusion

For the reasons stated above, the exchange-based plaintiffs' motion for interlocutory appeal is denied; the OTC, bondholder, and exchange-based plaintiffs' motions to add allegations with respect to antitrust are denied; the exchange-based plaintiffs' motion to add allegations with respect to trader-based manipulation is denied; BT-MU, Credit Suisse, and Norinchukin's motion for reconsideration is denied without prejudice to a similar motion being filed by defendants that addresses the issues raised herein; and, the OTC plaintiffs' motion for leave to reassert their unjust enrichment claim and to add a claim for breach of the implied covenant of good faith and fair dealing is granted.

By September 10, 2013, the OTC plaintiffs and the exchange-based plaintiffs shall each file a second amended complaint that conforms with the rulings herein. If defendants believe that the new complaints are inconsistent with our rulings, they shall inform us by September 20, 2013. Further, if defendants wish to file a motion for reconsideration on grounds similar to those asserted in BT-MU's, Credit Suisse's, and Norinchukin's motion and which addresses the issues we have raised, they must file such a motion by September 20, 2013. Finally, if defendants intend to

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[36] The stay does not apply to the motion to remand in *Salix Capital US Inc. v. Banc of America Securities LLC*, No. 13 Civ. 4018 (NRB).

move for reconsideration of the March 29 Order on statute of limitations grounds or to make a renewed motion to dismiss with regard to "Period 2" claims, they must seek leave to file such a motion by September 20, 2013.

This Memorandum and Order resolves docket entry nos. 296, 316, 327, 330, 333, and 341.

SO ORDERED.

/s/ Naomi Reice Buchwald
NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
August 23, 2013

APPENDIX H

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: LIBOR-Based Financial Instruments Antitrust Litigation.

THIS DOCUMENT RELATES TO: All Cases

11 MD 2262 (NRB)

MEMORANDUM AND ORDER

This multidistrict litigation ("MDL") arises out of the alleged manipulation of the London InterBank Offered Rate ("LIBOR"). To date, this Court has issued two decisions addressed to the sufficiency of the amended complaints filed in this action: the first on March 29, 2013 and the second on August 23, 2013. The March 29, 2013 decision, *inter alia*, dismissed the Sherman Act, section 1, claims advanced in each complaint on the ground that plaintiffs had failed to plausibly allege that they suffered antitrust injury and therefore lacked standing. Plaintiffs' motions for leave to amend their Sherman Act claims were denied in the August 23, 2013 decision. The original motions to dismiss were directed to four categories of cases denominated as follows: (1) over-the-counter plaintiffs, (2) exchange-based plaintiffs, (3) bondholder plaintiffs, and (4) Schwab plaintiffs. As a result of the decisions, the complaints brought by the bondholder and Schwab plaintiffs were dismissed in their entirety (although the state-law claims advanced by the Schwab plaintiffs were dismissed without prejudice, as the Court declined to exercise supplemental jurisdiction over them).

The bondholder plaintiffs filed a notice of appeal on September 17, 2013 and the Schwab plaintiffs did so on September 24, 2013. By separate, but essentially identical, letters dated September 18, 2013, the over-the-counter and the exchange-based plaintiffs sought certification pursuant to Federal Rule of Civil Procedure 54(b) to appeal the dismissal of their antitrust claims and the denial of their motions to amend those claims. Defendants, by letter dated October 4, 2013, suggested that the requests for Rule 54 (b) certification were committed to the Court's discretion and took no further position on the requests.

Rule 54 (b) is designed to provide flexibility to balance the benefits of a single appeal with the needs of litigants in particular multiple-claim and multiple-party cases. *See Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435 (1956); *Ginett v. Computer Task Grp.*, 962 F. 2d 1085, 1094-95 (2d Cir. 1992). These requests for Rule 54(b) certification are presented in an atypical context. In this MDL, two groups of plaintiffs – the bondholder plaintiffs and the Schwab plaintiffs – are in a position to appeal as of right because their complaints were dismissed in their entirety. The two remaining groups of plaintiffs – the over-the-counter plaintiffs and the exchange based plaintiffs – seek to join in the pending appeals only to the extent that they raise the issues of antitrust standing and antitrust injury. Whether this Court would in other circumstances grant Rule 54(b) certification seems to be the wrong focus. Rather, given that there are already appeals raising issues that affect all four categories of plaintiffs equally, judicial efficiency would be served by permitting the over the counter and exchange based plaintiffs to participate in the

existing appeals to the limited extent requested. Under these circumstances, there is no just reason for delay.

Accordingly, it is hereby

ORDERED, pursuant to Fed. R. Civ. P. 54(b), that final judgment is entered dismissing the first count of the over-the counter plaintiffs' consolidated amended complaint (Dkt. No. 130) for violation of section 1 of the Sherman Act, and denying leave to replead that claim in a proposed amended complaint (Dkt. No. 334-1), for the reasons given in the March 29, 2013 and August 23, 2013 orders of this Court, and it is further

ORDERED, pursuant to Fed. R. Civ. P. 54(b), that final judgment is entered dismissing the fourth count of the exchange based plaintiffs' amended consolidated class action complaint (Dkt. No. 134) for violation of section 1 of the Sherman Act, and denying leave to replead that claim in a proposed amended complaint (Dkt. No. 332 1), for the reasons given in the March 29, 2013 and August 23, 2013 orders of this Court.

SO ORDERED.

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
October 17, 2013

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: LIBOR-Based Financial Instruments Antitrust Litigation.

THIS DOCUMENT RELATES TO: All Cases

11 MD 2262 (NRB)

ORDER

WHEREAS, on October 17, 2013, this Court signed a Memorandum and Order addressing the request of over-the-counter and exchange-based plaintiffs for Rule 54(b) certification of the dismissal of their antitrust claims, and

WHEREAS, the October 17 Memorandum and Order was premised on the pendency of appeals on the same claim by bondholder and Schwab plaintiffs, and

WHEREAS, on October 30, 2013 the Court of Appeals, acting *sua sponte* determined that it lacked jurisdiction over the bondholder and Schwab appeals and dismissed them, it is hereby

ORDERED that the October 17, 2013 is withdrawn.

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Dated: New York, New York
October 31, 2013

OPPOSITION BRIEF

No. 13-1174

In the Supreme Court of the United States

ELLEN GELBOIM, ET AL., PETITIONERS,

v.

BANK OF AMERICA CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether when actions are consolidated for pretrial purposes, an order disposing of the claims in one of the actions is immediately appealable as a matter of right, notwithstanding other avenues to appeal such as the entry of partial judgment pursuant to Federal Rule of Civil Procedure 54(b).

CORPORATE DISCLOSURE STATEMENT

Respondent Bank of America, N.A. is wholly owned by BANA Holding Corporation, which in turn is wholly owned by BAC North America Holding Company, which in turn is wholly owned by NB Holdings Corporation, which in turn is wholly owned by respondent Bank of America Corporation. Respondent Bank of America Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent The Bank of Tokyo-Mitsubishi UFJ, Ltd. is wholly owned by Mitsubishi UFJ Financial Group, Inc.

Respondent Barclays Bank PLC is wholly owned by Barclays PLC.

Respondent Citibank, N.A. is wholly owned by Citicorp, which in turn is wholly owned by respondent Citigroup Inc. Respondent Citigroup Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. (Rabobank) has no parent corporation and no publicly held company owns 10% or more of Rabobank.

Respondent Credit Suisse Group AG has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent Deutsche Bank AG has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent HBOS plc is wholly owned by respondent Lloyds Banking Group plc, which has no

parent corporation and no publicly held company owns 10% or more of its stock.

Respondent HSBC Bank plc is wholly owned by respondent HSBC Holdings plc, which has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent JPMorgan Chase Bank, N.A. is wholly owned by respondent JPMorgan Chase & Co., which has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent The Norinchukin Bank has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent Portigon AG (f/k/a WestLB AG) has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent Royal Bank of Canada has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent The Royal Bank of Scotland Group plc has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent UBS AG has no parent corporation and no publicly held company owns 10% or more of its stock.

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

Respondents respectfully submit that the petition for a writ of certiorari should be denied.

OPINIONS BELOW

The order of the court of appeals dismissing petitioners' appeal for lack of jurisdiction (Pet. App. A) is not reported. The order of the court of appeals denying petitioners' motion for reconsideration (Pet. App. B) is not reported. The opinion of the district court granting in relevant part respondents' motion to dismiss (Pet. App. F) is reported at 935 F. Supp. 2d 666. The opinion of the district court denying petitioners leave to amend their complaint (Pet. App. G) is reported at 962 F. Supp. 2d 606.

JURISDICTION

The order of the court of appeals dismissing petitioners' appeal was entered on October 30, 2013. A motion for reconsideration was denied on December 16, 2013 (Pet. App. B). On March 7, 2014, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including April 15, 2014, and the petition was filed on March 26, 2014. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Like plaintiffs in over 60 other actions, petitioners have brought suit alleging manipulation of the London Interbank Offered Rate (LIBOR). Petitioners' case

has been consolidated in the district court with many of those other LIBOR-related actions for pretrial proceedings. When such proceedings resulted in the dismissal of some claims (including petitioners') but not others, rather than seek certification under Federal Rule of Civil Procedure 54(b) or 28 U.S.C. 1292(b), petitioners instead sought to take an immediate appeal.[1] They did so even though their case overlaps substantially with the cases still pending—at least 29 of which advance the exact same claim on virtually identical allegations—and the district court's resolution of those pending cases could moot the need for piecemeal appeals. The court of appeals held in those circumstances that it lacked appellate jurisdiction, see Pet. App. 1a-2a, and it subsequently denied reconsideration, see *id.* at 3a-4a.

1. *Factual Background.*

This case is one of many arising out of the alleged manipulation of LIBOR. LIBOR is an interest rate benchmark that is calculated for ten currencies, including the U.S. dollar. For each of those currencies, the British Bankers Association (BBA) has assembled a panel of banks whose interest rate submissions are used to calculate the benchmark. Every business day, the banks on each panel report to an independent administrator the rate at which they believe that they could borrow funds of the given currency in a reasonable market size from other banks in the London money market. Those submissions are used to calcu-

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[1] This Court and lower courts have referred to the entry of partial final judgment pursuant to Rule 54(b) as certification, see, *e.g.*, *Johanns* v. *Livestock Mktg. Ass'n*, 544 U.S. 550, 556 (2005), and this brief accordingly refers to the procedure the same way.

late LIBOR for each currency, and then both the submissions and LIBOR are published each morning. See Pet. App. 20a-23a.

Since April 2011, over 60 actions have been filed in or removed to federal courts across the country alleging that the panel banks conspired to manipulate U.S. Dollar LIBOR between 2005 and 2011. Plaintiffs in all of those actions contend that banks on the U.S. Dollar LIBOR panel made submissions that did not accurately reflect their expected borrowing rates. Because the cases involve "common questions of fact," including "factual issues arising from allegations concerning defendants' participation in the [U.S. Dollar LIBOR] panel," the Judicial Panel on Multidistrict Litigation (JPML) ordered that the cases be transferred to the United States District Court for the Southern District of New York for "coordinated or consolidated pretrial proceedings." *In re Libor-Based Fin. Instruments Antitrust Litig.*, 802 F. Supp. 2d 1380, 1381 (J.P.M.L. 2011).

2. *Procedural History and the District Court's Rulings.*

a. As a result of the JPML's order, the district court consolidated all of the then-pending putative class actions for pretrial proceedings. See Pet. App. 11a.[2] The court grouped those cases into three categories, each with a single lead action:

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[2] The district court initially consolidated the pending class actions for all purposes in Novmber 2011, but it subsequently consolidated the cases solely for pretrial purposes in July 2012. See Pet. App. 11a.

- the present case, brought by petitioners Ellen Gelboim and Linda Zacher on behalf of purchasers of LIBOR-based debt securities, alleging a federal antitrust claim (Bondholder Action);
- an action brought by purchasers of over-the-counter LIBOR-based instruments, alleging a federal antitrust claim and a state unjust enrichment claim (OTC Action); and
- an action brought by purchasers of LIBOR-based products on a domestic exchange, alleging a federal antitrust claim, a state unjust enrichment claim, and claims under the Commodity Exchange Act (CEA), 7 U.S.C. 1 *et seq.* (Exchange Action).

See Pet. App. 17a, 18a n.1, 59a, 148a, 153a. The court also appointed lead counsel in the OTC and Exchange Actions, who then filed consolidated amended complaints in those cases. See 1:11-md-2262, Doc. No. 66 (S.D.N.Y. Nov. 29, 2011) (Doc. No.); Doc. No. 130 (Apr. 30, 2012); Doc. No. 134 (Apr. 30, 2012).

In addition to the three lead putative class actions, there were also three individual actions pending before the district court brought by The Charles Schwab Corporation and other Schwab entities (Schwab Actions). See Pet. App. 17a. Like all of the putative class plaintiffs, the Schwab plaintiffs asserted a federal antitrust claim. See *id.* at 18a n.1. They also asserted claims under the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.*; and the Cartwright Act, Cal. Bus. & Prof. Code § 16700 *et seq.*, which is California's antitrust statute. See Pet. App. 18a n.1, 37a, 124a. In addition, the

Schwab plaintiffs asserted the same common law claim for unjust enrichment as the Exchange and OTC plaintiffs, as well as other common law claims for interference with economic advantage and breach of the implied covenant of good faith. See *id.* at 150a.

b. In April 2012, the plaintiffs in those six cases—the Bondholder, OTC, and Exchange Actions, and the three individual Schwab Actions—filed amended complaints containing essentially identical factual allegations. See Pet. App. 20a n.2, 27a. In June 2012, respondents jointly moved to dismiss all of those claims. Shortly thereafter, however, many new complaints were filed, and "[i]t quickly became apparent" to the district court that "new complaints would continue to be filed" and "waiting for the 'dust to settle' would require an unacceptable delay in the proceedings." *Id.* at 17a-18a. Accordingly, in August 2012, the court stayed all later-filed LIBOR-related actions, pending its decision on whether to dismiss the Bondholder, OTC, Exchange, and Schwab Actions. See *id.* at 18a. The court indicated its intent to use its rulings in those cases to guide the organization and disposition of the later-filed suits. See *ibid.*

In March 2013, the district court granted in part and denied in part respondents' motions to dismiss. See Pet. App. 16a-158a. The court dismissed the federal antitrust claim in all of the actions and the state antitrust claim in the Schwab Actions. See *id.* at 18a & n.1, 155a, 157a. The court also dismissed the RICO claim in the Schwab Actions. See *id.* at 124a, 157a. Having dismissed all of the federal claims in the OTC and Schwab Actions, the court declined to exercise supplemental jurisdiction over the remaining state common law claims in those cases. See *id.* at

147a-148a, 157a. That left only the federal CEA claims and state unjust enrichment claim at issue in the Exchange Action. The court dismissed the unjust enrichment claim, see *id.* at 155a, but held that the CEA claims survived in part, see *id.* at 95a, 156a, 159a n.1.

c. In the wake of the district court's decision, the parties filed several different motions. In August 2013, the district court addressed those motions. See Pet. App. 159a-218a. First, the court denied all of the putative class action plaintiffs leave to amend their antitrust claims. Second, the court denied reconsideration of its ruling on the CEA claims, but without prejudice to respondents' later filing a similar motion. Third, the court permitted the OTC plaintiffs to reassert their claim for unjust enrichment and to add a claim for breach of the implied covenant of good faith and fair dealing. Fourth, the court denied a request by the Exchange plaintiffs to certify for interlocutory appeal a question related to their CEA claims. See *id.* at 160a-161a. The net effect of those rulings was that all of the claims in the Bondholder and Schwab Actions were dismissed, but further proceedings were required on remaining claims in the Exchange and OTC Actions. The district court also left in place its stay on other actions in order to avoid "addressing individual cases piecemeal rather than comprehensively." *Id.* at 216a.

Further proceedings continued to unfold just as the district court's order contemplated. In the fall of 2013, respondents filed motions seeking dismissal of the remaining claims: the federal claims in the Exchange Action for commodities manipulation and the state claims in the OTC Action for unjust enrichment

and breach of the implied covenant of good faith and fair dealing. See Doc. No. 417 (Sept. 20, 2013); Doc. No. 418 (Sept. 20, 2013); Doc. No. 452 (Oct. 9, 2013); Doc. No. 507 (Nov. 26, 2013).[3] In turn, plaintiffs in the Exchange Action moved to amend the factual allegations in their complaint and also sought reconsideration of certain aspects of the district court's ruling on their CEA claims. See Doc. No. 396 (Sept. 6, 2013). In February 2014, the district court held a hearing on the parties' motions and its decision is pending.

3. *Petitioners' Proposed Appeal.*

a. Although petitioners' action was consolidated with the cases that remain pending before the district court, both petitioners and the Schwab plaintiffs filed notices of appeal relating to the dismissal of their claims. See Pet. App. 220a. One of those claims, however—*i.e.*, the federal antitrust claim—had also been asserted and dismissed in the Exchange and OTC Actions. Plaintiffs in the Exchange and OTC Actions therefore sought "to join in the pending appeals only to the extent that they raise the issues of antitrust standing and antitrust injury." *Ibid.* The district court reasoned that, because "there [were] already appeals raising issues that affect all four categories of plaintiffs equally, judicial efficiency would be served by permitting the [Exchange and OTC] plaintiffs to participate in the existing appeals to the limited extent requested." *Id.* at 220a-221a. The court therefore directed entry of final judgment on the federal

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[3] Respondents filed a motion for reconsideration and a renewed motion to dismiss, but this brief refers to those pending filings as motions to dismiss for the sake of convenience.

antitrust claims in the Exchange and OTC Actions pursuant to Rule 54(b). See *id.* at 221a.

As the foregoing procedural history illustrates, the proposed appeal attempted to present a hodgepodge of issues to the court of appeals: the federal antitrust claim in all of the actions; the state antitrust claim in the Schwab Actions; and the RICO claim in the Schwab Actions. See Doc. No. 409 (Sept. 17, 2013) (petitioners' notice of appeal); Doc. No. 429 (Sept. 23, 2013) (Schwab plaintiffs' notice of appeal). Meanwhile, other federal claims (under the CEA) and state claims (for unjust enrichment and breach of the implied covenant of good faith and fair dealing) remained pending before the district court. Respondents' motions to dismiss those claims have been under submission for several months and are ripe for decision. If granted, the district court could enter a judgment disposing of all claims in the Bondholder, Exchange, OTC, and Schwab Actions.

b. In October 2013, the court of appeals dismissed petitioners' appeal and the Schwab plaintiffs' appeal *sua sponte* in a one-paragraph, unpublished order. See Pet. App. 1a-2a. The court determined that it lacked jurisdiction over the appeals because "a final order has not been issued by the district court as contemplated by 28 U.S.C. § 1291, and the orders appealed from did not dispose of all claims in the consolidated action." Pet. App. 2a. The court relied in part on its previous decision in *Houbigant, Inc.* v. *IMG Fragrance Brands, LLC*, 627 F.3d 497 (2010) (per curiam), in which the court explained that, under circuit precedent, "when there is a judgment in a consolidated case that does not dispose of all claims which have been consolidated, there is a strong presumption that

the judgment is not appealable absent Rule 54(b) certification." *Id.* at 498 (quoting *Hageman* v. *City Investing Co.*, 851 F.2d 69, 71 (2d Cir. 1988)).

In light of the court of appeals' order, the district court withdrew its Rule 54(b) certification of the antitrust claims in the Exchange and OTC Actions. See Pet. App. 222a. The court's earlier certification had been "premised on the pendency of appeals on the same claim by bondholder and Schwab plaintiffs." *Ibid.* The Exchange and OTC plaintiffs thereafter again sought certification, this time joined by petitioners and the Schwab plaintiffs. See Doc. No. 522 (Jan. 10, 2014). At a hearing in February 2014, the district court declined to certify a piecemeal appeal: "[T]his case has a wonderful host of interesting issues. We could send six issues up to the circuit. We're not doing that. We're not doing it seriatim. We're going to clean up this complaint. I'm not saying that I'm ever certifying the question. But we're not picking and choosing particular questions and sending them up." Doc. No. 551, at 78 (Feb. 25, 2014).

c. Petitioners and the Schwab plaintiffs moved for reconsideration of the order dismissing their appeals. Notably, petitioners made none of the arguments that they now present to this Court: they did not argue that Second Circuit precedent was incorrect or in conflict with precedent from other circuits. Nor did petitioners request that the Second Circuit grant en banc review to resolve any conflict. Rather, petitioners argued that the Second Circuit's presumption against piecemeal appeals applies only to cases consolidated for all purposes, not cases (like theirs) consolidated for pretrial proceedings. See 13-3565, Doc. No. 134, at 8-9, 12-14 (2d Cir. Nov. 15, 2013); 13-3565, Doc. No.

144, at 4 (2d Cir. Dec. 9, 2013). In December 2013, the court of appeals denied reconsideration without further comment. See Pet. App. 3a-4a. Petitioners now seek this Court's review, but the Schwab plaintiffs do not.

ARGUMENT

This case is one of more than 60 related actions pending before the district court for pretrial proceedings. Although that court continues to bring this sprawling litigation under control, petitioners nevertheless contend that they are entitled to take an immediate appeal because their claim is among those that have been dismissed. Fortunately for petitioners, there is a remedy tailor-made for that situation: the entry of a partial final judgment under Federal Rule of Civil Procedure 54(b). Unfortunately for petitioners, the district court denied their request for relief under Rule 54(b) because, at least at this juncture, a piecemeal appeal would be inefficient and disruptive. Petitioners' case overlaps substantially with many of the cases still pending, at least 29 of which advance the exact same claim on virtually identical allegations. The district court was understandably reluctant to grant petitioners an early appeal when it is still actively managing other parallel cases.

In any event, the key point is that Rule 54(b) provides an avenue for appeal from consolidated pretrial proceedings when there is no just reason for delay. As a practical matter then, it is inconsequential whether litigants are automatically entitled to appeal from such proceedings as of right. The only putative appeals screened out by Rule 54(b) are those that, in the judgment of district courts on the front lines of

litigation, would squander judicial resources and disserve sound decision-making. Because that has hardly proven to be a concern, no one has asked the Advisory Committee to address the issue in the Federal Rules—and no litigant has asked this Court to review the issue in nearly a quarter-century. Even now, petitioners do not address the merits of the decision below: they say nothing about why that decision is supposedly incorrect or why the current system is in need of revision.

In the face of petitioners' silence, this Court should not grant a once-in-a-generation request to constrain the discretion of district courts and unsettle the structure for handling consolidated cases. The critical and inherent authority of trial courts to manage their own dockets cannot be disputed. The question presented here arises almost exclusively in large and complex consolidated proceedings—which is to say, the set of cases in which trial courts' flexibility is most crucial to reaching timely and just resolution. Moreover, Congress and the Advisory Committee already have channeled that discretion through procedural mechanisms like Rule 54 and 28 U.S.C. 1292 that allow appeals in appropriate cases. What petitioners want is an additional and automatic pathway to appeal, in the most challenging of administrative circumstances, even when the equities and interests of justice dictate that immediate appeal is not warranted. It is easy to see why that position has not been popular with parties before the Advisory Committee or this Court, and why petitioners do not defend it on the merits here.

Even assuming that the question presented were sufficiently important to warrant this Court's review, this case would be an exceedingly poor vehicle for ad-

dressing it. Petitioners said not a word below about the need for the Second Circuit to overrule its case law and adopt the approach of any sister circuit. Because petitioners never raised below the question they now seek to present, the court of appeals never had the opportunity to consider and pass upon whatever arguments petitioners may wish to advance. Moreover, it is not even apparent that petitioners need the relief they belatedly request. The district court currently has before it dispositive motions that, if granted, might yield a final and appealable judgment. And if that does not happen, petitioners may again seek the entry of judgment under Rule 54(b) for their antitrust claim at some point in the future. Before this Court grants review of a question that comes before it so infrequently, it ought to be clear that petitioners have exhausted their options and still face the prospect of interminable appellate delay.

A. The Question Presented Is Not Practically Important And Does Not Warrant This Court's Review

Petitioners begin by conflating (Pet. 7) two different categories of cases: those consolidated for all purposes and those consolidated solely for pretrial purposes. With respect to the former, there does not appear to be any disagreement among the courts of appeals. They have uniformly held that when actions are fully consolidated, an order disposing of only some of the consolidated claims or actions is not appealable as a matter of right.[4] Of course, district courts fre-

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[4] See, *e.g.*, *Florida Wildlife Fed'n, Inc.* v. *Administrator, U.S. E.P.A.*, 737 F.3d 689, 693 (11th Cir. 2013); *Blackman* v. *District of Columbia*, 456 F.3d 167, 175 n.9 (D.C. Cir. 2006); *Alinsky* v. *United*

quently allow an appeal under Federal Rule of Civil Procedure 54(b) by "direct[ing] entry of a final judgment as to one or more, but fewer than all, claims or parties if * * * there is no just reason for delay." But absent certification under Rule 54(b), parties are not entitled to appeal orders that dispose of only pieces of fully consolidated litigation.

The issue before this Court is far narrower and less consequential. Petitioners' putative class action has been consolidated with similar actions solely for pretrial purposes. See Pet. App. 10a-11a. The limited question here is thus whether when actions are consolidated for pretrial purposes, an order disposing of the claims in one of the actions is immediately appealable even while pretrial proceedings remain ongoing. Petitioners are correct (Pet. 7-11) that the courts of appeals have taken different approaches to that limited question, but there is a straightforward reason why the dispute has not been brought to this Court during the last quarter-century: the differences in theory have long proven unimportant in practice. That is why petitioners simply assert "[t]here can be no dispute" that the issue "is sufficiently important," without making any attempt to substantiate their assertion. Pet. 11. An issue that comes along once in a generation hardly cries out for this Court's review.

1. As an initial matter, the question here is purely procedural. It concerns *when*—not *whether*—a limited category of appeals will go forward. Petitioners

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States, 415 F.3d 639, 642-643 (7th Cir. 2005); *Global Naps, Inc.* v. *Verizon New England, Inc.*, 396 F.3d 16, 22 (1st Cir. 2005); *McLaughlin* v. *Mississippi Power Co.*, 376 F.3d 344, 350 (5th Cir. 2004); *Hall* v. *Wilkerson*, 926 F.2d 311, 314 (3d Cir. 1991).

will have their day in appellate court, and whether that day falls tomorrow or further in the future does not affect the substantive rights of any party. Moreover, like many other purely procedural issues, the timing of appellate review is generally governed by the Federal Rules. See Fed. R. Civ. P. 54(b); Fed. R. App. P. 4(a); see also *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 438 (1956) (upholding Rule 54(b) as consistent with the final-decision requirement in 28 U.S.C. 1291); *Bolin* v. *Sears, Roebuck & Co.*, 231 F.3d 970, 974 & nn.18-19 (5th Cir. 2000) ("[T]he timing rules for appellate review are generally set forth by rule, not by statute."). Accordingly, the Civil Rules Advisory Committee could revise Rule 54(b) and provide that certification is mandatory rather than discretionary in these circumstances, but that committee—not this Court—is the appropriate body to consider petitioners' arguments in the first instance.

2. The availability of certification under Rule 54(b), however, has obviated the need for any change in practice. Under Rule 54(b), a district court may enter final judgment as to particular claims or parties when "there is no just reason for delay." In other words, a party whose claims are dismissed from consolidated proceedings can appeal when the "interest of sound judicial administration" and "the equities involved" so require. *Curtiss-Wright Corp.* v. *Gen. Elec. Co.*, 446 U.S. 1, 8 (1980) (internal quotation marks omitted). Parties to consolidated proceedings regularly satisfy that standard. See, *e.g.*, *In re Terrorist Attacks on September 11, 2001*, 714 F.3d 659, 672 (2d Cir. 2013) (hearing an appeal pursuant to Rule 54(b) certification in a consolidated action); *Bayer*

Healthcare Pharm., Inc. v. *Watson Pharm., Inc.*, 713 F.3d 1369, 1373 n.3 (Fed. Cir. 2013) (same); *In re Gentiva Sec. Litig.*, No. 10-cv-5064, 2014 WL 814952, at *7 (E.D.N.Y. Mar. 3, 2014) (entering Rule 54(b) certification in a consolidated action).

As a practical matter then, it is unimportant whether litigants are entitled to appeal from consolidated pretrial proceedings, because they may appeal under Rule 54(b) whenever there is no just reason for delay. See, *e.g.*, *Curtiss-Wright Corp.*, 446 U.S. at 8; *James* v. *Price Stern Sloan, Inc.*, 283 F.3d 1064, 1067 n.6 (9th Cir. 2002) ("In reality, issuance of a Rule 54(b) order is a fairly routine act that is reversed only in the rarest instances."); *Intergraph Corp.* v. *Intel Corp.*, 253 F.3d 695, 699 (Fed. Cir. 2001) ("District courts have substantial discretion in determining when there is no just cause for delay in entering judgment under Rule 54(b)."); *Ginett* v. *Computer Task Group, Inc.*, 962 F.2d 1085, 1096 (2d Cir. 1992) ("Only those claims 'inherently inseparable' from or 'inextricably interrelated' to each other are inappropriate for rule 54(b) certification.").

Indeed, the question presented affects only two classes of cases: actions in which a party has elected not to move for certification, and actions in which the district court has determined in response to a Rule 54(b) request that judicial administrative interests and equity weigh against an immediate appeal. See, *e.g.*, *Pitzer* v. *City of East Peoria*, No. 08-CV-1120, 2010 WL 4879077, at *2 (C.D. Ill. Nov. 18, 2010) ("[A] 54(b) certification here would waste, rather than conserve[,] judicial resources."); *UniCredito Italiano SpA* v. *JPMorgan Chase Bank*, 288 F. Supp. 2d 485, 506 (S.D.N.Y. 2003) ("The dismissed and remaining

claims here arise from essentially the same factual allegations; judicial economy will best be served if multiple appellate panels do not have to familiarize themselves with this case in piecemeal appeals."). Those are hardly the types of cases that ought to clog the appellate courts or on which this Court should expend its limited resources.

Courts have recognized that the availability of certification under Rule 54(b) significantly diminishes the importance of whether litigants are entitled to immediate appeals as of right. See *In re Refrigerant Compressors Antitrust Litig.*, 731 F.3d 586, 592 (6th Cir. 2013) (noting that even if litigants "would experience hardship if they had to wait until the end of pretrial proceedings to appeal, * * * other routes to an appellate court ordinarily will reduce any hardship that [litigants] might face"); *Page Plus of Atlanta, Inc.* v. *Owl Wireless, LLC*, 733 F.3d 658, 659, 660 (6th Cir. 2013) (describing Rule 54(b) as a "safety valve[]" that permits "appeals where the benefits of an immediate appeal from a non-final order outweigh the costs"); see also *Jordan* v. *Pugh*, 425 F.3d 820, 829 (10th Cir. 2005) ("Partial final judgment [under Rule 54(b)] is intended to serve the limited purpose of protecting litigants from undue hardship and delay in lawsuits involving multiple parties or multiple claims."); *SEC* v. *Capital Consultants LLC*, 453 F.3d 1166, 1173-1174 (9th Cir. 2006) (same).[5]

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[5] Rule 54(b) is not the only route to appellate court. Section 1292(a) of Title 28 provides appellate jurisdiction over certain types of interlocutory orders. Section 1292(b) also allows a district court to certify an interlocutory appeal when "[its] order involves a controlling question of law as to which there is substantial ground for difference of opinion and * * * an immediate appeal from the or-

In some cases, litigants have even obtained certification while attempting to appeal by right, or had their appeals dismissed without prejudice to seeking certification. See *Keshner* v. *Nursing Pers. Home Care*, No. 13-1688-cv, 2014 WL 1303166, at *3 (2d Cir. Apr. 2, 2014) (court of appeals deferred consideration of its jurisdiction, directed the district court to decide certification, and then upheld jurisdiction after certification under Rule 54(b)); *Kersh* v. *Gen. Council of Assemblies of God*, 804 F.2d 546, 547 n.1 (9th Cir. 1986) (observing that although the court initially lacked jurisdiction "to review only one of two consolidated cases, * * * [s]ubsequently, the appellant obtained a proper Rule 54(b) certification"); see also *Griffin* v. *Jefferson Parish School Bd.*, 51 Fed. Appx. 929 (5th Cir. 2002) (per curiam) ("We dismiss the appeal without prejudice to give the parties an opportunity to request Rule 54(b) certification."). Whatever the distinctions in theory between the circuits' approaches, they have not amounted to a meaningful difference in practice.

3. That is why, as far as petitioners say and respondents have been able to determine, this issue has

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der may materially advance the ultimate termination of the litigation." See *In re Refrigerant Compressors Antitrust Litig.*, 731 F.3d at 592 (noting that, like Rule 54(b), Section 1292(b) mitigates whatever hardship parties in consolidated proceedings might otherwise face). Petitioners correctly did not seek certification under Section 1292(b), because their appeal does not present a debatable and controlling legal question and would not materially advance the ultimate termination of the broader multidistrict litigation. But that is simply evidence that an appeal in their particular case is not warranted at this time; it is not evidence of any systemic need for "judicial expansion" of the various routes to appeal. *Ibid.*

not been brought to this Court's doorstep for nearly a quarter-century. In 1990, the Court granted certiorari to resolve the question in *Erickson* v. *Maine Cent. R. Co.*, 498 U.S. 807, but subsequently dismissed the case after the parties settled, see 498 U.S. 1018 (1990). Petitioners have not pointed to another certiorari petition raising the question since *Erickson*'s Term.[6] Since that time, the Court apparently has not received even a single request to wade back into these waters. Petitioners focus instead (Pet. 7-8) on the fact that most circuits have addressed the question in the past couple of decades. But that says nothing about any need for this Court's review. What petitioners lack is any evidence that, in the circuits not affording an unqualified right to immediate appeal, the absence of such a right has been a practical problem notwithstanding other appellate avenues like Rule 54(b).

Petitioners fall back on the argument that appealability "has the *potential* to arise not only from every body of litigation that is subject to coordination by the Judicial Panel on Multidistrict Litigation, but each time a district court consolidates related actions." Pet. 11-12 (emphasis added). The JPML, however, transfers thousands of cases each year for coordinat-

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[6] While *Erickson* was pending, another petitioner presented the same question and pointed to the same four-way circuit split as petitioners do here. See Petition for a Writ of Certiorari at i, *Gerstin* v. *Spann*, No. 90-205, 1990 WL 10058749 (Aug. 1, 1990). Shortly after this Court dismissed the writ of certiorari in *Erickson*, it denied the writ in *Gerstin*. See *Gerstin* v. *Spann*, 498 U.S. 1046 (1991). Simply put, nothing has changed in the last 23 years to warrant a different result here. If anything, the intervening decades only confirm the lack of any need for this Court's review.

ed or consolidated pretrial proceedings.[7] And that is on top of the countless other actions consolidated by district courts. Given the widespread use of consolidation, it is telling that petitioners' speculative harms have not come to pass. The reason again is that routes to appeal like Rule 54(b) and 28 U.S.C. 1292 mitigate whatever hardship litigants might otherwise face. At the least, the Court should not address this question without some showing—which petitioners have not even attempted here—that Rule 54(b) has failed to strike the appropriate balance between finality and preservation of judicial resources.

The petition is academic for another reason: petitioners do not actually say why they believe that the court of appeals erred or what approach they would urge this Court to adopt on the merits. They simply point to the circuit conflict and say that this Court should address "the interplay between 28 U.S.C. § 1291, Federal Rule of Civil Procedure 42(a), Federal Rule of Civil Procedure 54(b), and (in multidistrict proceedings) 28 U.S.C. § 1407." Pet. 12. But this is not a law school examination. Respondents cannot defend the court of appeals' judgment without knowing why it is supposedly incorrect, and petitioners have thus left this Court (and respondents) guessing how the parties will join issue on the merits. Petitioners may be reticent to say more because then it would

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[7] See *United States Courts: Judicial Panel on Multidistrict Litigation*, Administrative Office of the United States Courts, http://www.uscourts.gov/Statistics/JudicialBusiness/2013/judicial-panel-multidistrict-litigation.aspx (noting that during 2013 alone the JPML transferred 5,521 cases for coordinated or consolidated pretrial proceedings).

be clear precisely what they are defending: the expenditure of judicial resources on appeals that, by definition, are not in the interests of sound judicial administration or equity (because if they were, litigants could invoke Rule 54(b)). Indeed, as explained below, this is just such a case: an appeal here makes little sense in light of the cases and claims still pending before the district court. See pp. 26-28, *infra*.

4. Questions about timing and docket management are typically best left to the sound judgment of courts on the front lines of litigation. As this Court has previously recognized, "[t]he function of the district court under [Rule 54(b)] is to act as a 'dispatcher.'" *Curtiss-Wright Corp.*, 446 U.S. at 8 (quoting *Sears*, 351 U.S. at 435; internal citation omitted). In light of the district court's unique perspective on litigation as a whole, "[i]t is left to the sound judicial discretion of the district court to determine the 'appropriate time' when each final decision in a multiple claims action is ready for appeal." *Ibid.* (quoting *Sears*, 351 U.S. at 435); see *id.* at 10-11 ("[W]e are reluctant either to fix or sanction narrow guidelines for the district courts to follow."); *Sears*, 351 U.S. at 435 (recognizing lower courts' "demonstrated need for flexibility" in deciding whether to permit partial appeals under Rule 54(b)). To the extent that there is any real difference in practice between the circuits' approaches to appeals in consolidated cases, that is the natural result of allowing courts to manage their dockets, oversee often unwieldy litigation, and help to ensure that appellate judicial resources are deployed appropriately.

The need for such flexibility is particularly pronounced in "a sprawling multidistrict matter such as

this," which "presents a special situation [where] the district judge must be given wide latitude with regard to case management in order to effectively achieve the goals set forth by the legislation that created the Judicial Panel on Multidistrict Litigation." *In re Asbestos Products Liab. Litig. (No. VI)*, 718 F.3d 236, 247 (3d Cir. 2013); see *In re Phenylpropanolamine (PPA) Products Liab. Litig.*, 460 F.3d 1217, 1232 (9th Cir. 2006) ("[M]ultidistrict litigation is a special breed of complex litigation where the whole is bigger than the sum of its parts. The district court needs to have broad discretion to administer the proceeding as a whole.").

Here, for instance, more than 60 LIBOR-related cases from across the country are pending before the district court. Those cases have a complicated procedural history, and they raise a host of overlapping federal and state claims that the district court continues to address "in a manner that is both careful and efficient." 1:11-md-2262, Doc. No. 226, at 2 (J.P.M.L. Jun. 6, 2013). In circumstances like these, district courts are the best positioned to determine when partial appeals are warranted under Rule 54(b). This Court should not grant a once-in-a-generation request to constrain discretion in the lower courts and thereby unsettle the system for handling consolidated cases and multidistrict litigation.

B. This Case Is Not An Appropriate Vehicle For Resolving The Question Presented In Any Event

Even assuming that appealability as of right in consolidated pretrial proceedings were sufficiently important to warrant this Court's review, this case

would be an exceedingly poor vehicle for addressing that issue. Petitioners never pressed their current arguments below, and thus the court of appeals never considered them. No doubt the Second Circuit would be surprised to learn that its circuit precedent is now under wholesale attack, because petitioners said not a word below about the need for the Second Circuit to overrule its case law and adopt the approach of any other circuit. Moreover, it is not even apparent that petitioners need the relief they belatedly seek. The district court currently has before it dispositive motions that, if granted, might yield a final and appealable judgment. And if that does not happen, petitioners may again seek certification under Rule 54(b) for their antitrust claim at some point in the future. Before this Court grants certiorari to consider a question that arises so infrequently and has so little real-world significance, it ought to be certain that petitioners actually face the prospect of undue appellate delay.

1. This Court's traditional rule precludes a grant of certiorari when "the question presented was not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (internal quotation marks omitted); see *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view."); *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (quoting *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970)). When petitioners assert new substantive arguments that attack the decision below, they ask this Court unnecessarily "to abandon [its]

usual procedures in a rush to judgment without a lower court opinion." *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009); cf. *United States* v. *United Foods, Inc.*, 533 U.S. 405, 417 (2001).

Here, petitioners were not simply silent below: they chose to press a very different set of arguments. When the Second Circuit dismissed petitioners' appeal, its brief order relied in part on its previous decision in *Houbigant, Inc.* v. *IMG Fragrance Brands, LLC*, 627 F.3d 497 (2010) (per curiam). See Pet. App. 2a.[8] In *Houbigant*, the district court had dismissed one of two consolidated cases, and the Second Circuit held that it lacked appellate jurisdiction over the dismissed case. See 627 F.3d at 498-499. As relevant here, the Second Circuit explained that, under circuit precedent, "when there is a judgment in a consolidated case that does not dispose of all claims which have been consolidated, there is a strong presumption that the judgment is not appealable absent Rule 54(b) certification." *Id.* at 498 (quoting *Hageman* v. *City Investing Co.*, 851 F.2d 69, 71 (2d Cir. 1988)).[9]

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[8] The Second Circuit also appeared to rely on the fact that the district court did not enter judgment as required by Federal Rule of Civil Procedure 58, because judgment was neither set out in a separate document nor noted on the docket. See Pet. App. 2a; Fed. R. Civ. P. 58(a) and (c)(2). Whether there is even a valid judgment in this case presents a substantial threshold question that could prevent the Court from reaching the merits of appealability as of right in consolidated pretrial proceedings. That provides yet another reason why further review would not be appropriate here.

[9] The Second Circuit reasoned that the presumption was not overcome in *Houbigant* because "the pending and dismissed actions overlap[ped] in potentially significant ways," "resolution of the pending action could [have] moot[ed] the central issue in th[e] ap-

In their reconsideration papers below, petitioners argued that the *Houbigant/Hageman* presumption against piecemeal appeals applies to cases consolidated for all purposes, but not cases (like theirs) consolidated only for pretrial purposes. See 13-3565, Doc. No. 134, at 12 (2d Cir. Nov. 15, 2013) ("[W]hile the consolidation at issue in *Houbigant*—and in *Hageman*—was a full consolidation under Rule 42(a), the Bondholder [A]ction was consolidated with the other class actions here for *pretrial purposes only*.") (emphasis in original); *id.* at 8-9, 13-14 & n.7; 13-3565, Doc. No. 144, at 4 (2d Cir. Dec. 9, 2013) ("Dismissal of the appeals was error because *Houbigant* and *Hageman* do not apply.") (capitalization omitted). Petitioners also argued that, even if the *Houbigant/Hageman* presumption applied, it was rebutted on the facts of their appeal. See *id.* at 11 ("Even if the *Hageman* presumption applies, this case presents facts rebutting it.") (capitalization omitted). In other words, petitioners contended that for two distinct reasons they were entitled to appeal under circuit precedent.

What petitioners never contended, however, was that Second Circuit precedent is incorrect and should be discarded in favor of some other approach. They did not seek en banc review and they said nothing about the circuit conflict that now forms the basis of their plea for this Court's review. See Pet. i, 7-11. That was undoubtedly a strategic choice. Petitioners were aware that other circuits have adopted different

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peal," and "the district court [was] still actively engaged in decisionmaking." 627 F.3d at 498-499. As explained below, those same reasons apply in this case. See pp. 26-28, *infra*.

approaches, because respondents candidly called that fact to the court of appeals' attention—and did so precisely to point out that the circuit precedent on which petitioners relied did not in fact support appellate jurisdiction. See 13-3565, Doc. No. 141, at 9 (2d Cir. Nov. 27, 2013); see also *Missouri* v. *Jenkins*, 515 U.S. 70, 104 (1995) (O'Connor, J., concurring) ("Beyond the plain words of the question presented, the State's opening brief placed respondents on notice of its argument.").

Even then, petitioners did not challenge Second Circuit precedent in their reply brief. Doing so, of course, would have elevated the significance of the court of appeals' dismissal order, and petitioners' decision reflected the strategic choice that arguing for a favorable *application* of circuit precedent was more likely to be effective than outright criticism. See, *e.g.*, *NLRB* v. *RELCO Locomotives, Inc.*, 734 F.3d 764, 796 (8th Cir. 2013) ("The fact that RELCO initially decided not to pursue this argument * * * is a strategic decision whose consequences it must accept."); *United States* v. *Cooper*, 243 F.3d 411, 416 (7th Cir. 2001) (finding argument waived because failure to raise it in district court "was clearly a strategic decision rather than a mere oversight"). Only now, having failed to prevail on that limited ground, do petitioners set their sights higher. That is the type of gamesmanship this Court's traditional presentation rule exists to prevent. And it has resulted in the type of decision least suited to this Court's review: a brief unpublished order devoid of any analysis related to the question presented.

2. Setting aside the late-breaking nature of petitioners' arguments, there is no need for immediate

review of their appeal. In the fall of 2013, respondents filed motions to dismiss the remaining claims in the Exchange and OTC Actions, *i.e.*, the federal claims for commodities manipulation (Exchange Action) and the state claims for unjust enrichment and breach of the implied covenant of good faith and fair dealing (OTC Action). See pp. 6-7 & n.3, *supra*. Those motions have been pending before the district court for several months and are ripe for decision any day. If they are granted, that could moot petitioners' case in this Court, because petitioners could attempt to appeal from a judgment in the district court disposing of all claims in the Bondholder, Exchange, OTC, and Schwab Actions.

Even if the district court allows some claims by other plaintiffs to proceed, petitioners may still seek to have their antitrust claim certified for appeal under Rule 54(b). The district court has been understandably reluctant to spin off a series of appeals as it actively manages this extensive litigation, which includes many claims materially similar to petitioners'. But the court has suggested that, once it has addressed all of plaintiffs' claims and clarified the legal landscape, it will consider whether to grant certification in an orderly way. As the court explained in response to plaintiffs' latest request for certification, "[T]his case has a wonderful host of interesting issues. We could send six issues up to the circuit. We're not doing that. *We're not doing it seriatim. We're going to clean up this complaint.* I'm not saying that I'm ever certifying the question. But we're not picking and choosing particular questions and sending them up." Doc. No. 551, at 78 (emphasis added).

Petitioners may see some tactical advantage in running straight to the court of appeals ahead of other plaintiffs raising the same claim, but the district court is charged with sensibly managing the entire consolidated litigation. At least at this point in time, an appeal by petitioners standing alone does not make sense given the extensive overlap between petitioners' case and many of the other cases. Plaintiffs in the Exchange, OTC, and Schwab Actions all assert the same federal antitrust claim as petitioners. Until the district court resolves the remaining claims in the Exchange and OTC Actions (which could happen any day), those plaintiffs are before the district court. And because plaintiffs in the Schwab Actions have not sought this Court's review, petitioners would be the only ones taking an appeal on a claim common to all the actions if they were granted an immediate appeal now. Doubtless other appeals would follow raising that exact same federal antitrust claim, as well as a similar state antitrust claim and a host of other claims, both federal and state. That type of appellate balkanization would squander judicial resources and disserve sound decision-making.

The inefficiencies imposed on this multidistrict litigation by allowing petitioners' piecemeal approach could be particularly severe because, in addition to the three sets of consolidated putative class actions and the individual Schwab actions, there are more than 35 other stayed actions pending below. At least 29 of those actions raise antitrust claims, and plaintiffs in at least two of the putative class actions seek to represent groups that overlap with petitioners' proposed class. The district court thus has a far greater range of issues and interests to consider, and

"[i]t would be improvident to interject appellate review into a case where the district court is still actively engaged in decisionmaking." *Houbigant*, 627 F.3d at 499. The district court should be permitted instead to move forward; address the handful of remaining claims at issue in the Exchange and OTC Actions; and then, if any claims survive respondents' pending motions to dismiss, decide in due course whether Rule 54(b) certification is warranted on discrete sets of claims to provide both finality and clarity to petitioners and other plaintiffs.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted.

MAY 27, 2014

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REPLY BRIEF

No. 13-1174

IN THE

Supreme Court of the United States

ELLEN GELBOIM AND LINDA ZACHER,
INDIVIDUALLY FOR THEMSELVES AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

CREDIT SUISSE GROUP AG ET AL.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

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REPLY BRIEF FOR THE PETITIONERS

The circuits are intractably divided over whether and in what circumstances a party may immediately appeal the dismissal of an action that is consolidated with other suits. This case presents the ideal opportunity to resolve that conflict. Respondents' arguments are unpersuasive or support review.

I. Importance of the Question Presented

Respondents refute their own argument (BIO 12-21) that the Question Presented is unworthy of this Court's review. They admit that twelve circuits apply four irreconcilable rules. *Id.* 13 (citing Pet. 7-11). They then explain why the issue arises frequently: the multidistrict litigation panel "transfers thousands of cases each year for coordinated or consolidated pretrial proceedings," on top of "countless other actions consolidated by district courts." *Id.* 18-19.

The conflict was already important enough in 1990 that this Court granted certiorari to resolve it in *Erickson v. Maine Central R.R.*, 498 U.S. 807 (1990), *cert. dismissed*, 498 U.S. 1018 (1990). Things are worse now, as more courts of appeals have joined the fray. *See* Pet. 7-11. No petition has been filed since *Erickson* was dismissed (*id.*), but only because there are relatively few viable opportunities. The petition generally must come from one of the minority of circuits that forbids an immediate appeal. Any petition from one of the other circuits would have no purpose, because it would be filed after the merits of the appeal were already decided. Also, a petition will be filed only in a case with unusually high stakes, given the cost of seeking review in this Court (with uncertain prospects at both the certiorari stage and

the merits) when the prize only is the opportunity to appeal immediately (with uncertain prospects on the merits of the appeal too). The Court should accordingly take this unique opportunity to resolve the conflict.

The significance of the issue is not diminished by the prospect that some subset of appellants could in the alternative secure appellate review under Federal Rule of Civil Procedure 54(b). *Contra* BIO 14-17. Rule 54(b) is not a *substitute* for an appeal as of right, because "an appeal following a Rule 54(b) order is the exception rather than the rule." 10 Charles A. Wright et al., Federal Practice & Procedure § 2654 (3d ed.). In this very case, after the Second Circuit dismissed the appeal, the district court both revoked its Rule 54(b) certification for the other non-stayed cases and refused to certify its dismissal of petitioners' complaint. Pet. App. 222a; Dkt. No. 551, at 78 (Feb. 25, 2014).

So the question whether a party instead may appeal as a matter of right arises frequently. The Appendix collects fifty cases in which it has arisen – forty since the writ was dismissed in *Erickson*. *See* App. A, *infra*. (The issue has been presented in still more cases. Collecting more than fifty illustrative rulings simply seemed superfluous.)

The recurring question whether an immediate appeal is permissible is important. It occupies the time of the lower courts, then produces irreconcilable outcomes. It also presents important issues regarding "the inconvenience and cost of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson v. Petroleum Conversion Corp.*,

338 U.S. 507, 511 (1950). In this case, petitioners are forbidden – likely for years – from appealing the dismissal of their complaint as a matter of right. Respondents' contrary position is that district courts must have the discretion to decide when the appeal should occur. BIO 20-21. But they admit that most circuits reject that rule. *Id.* 13. In fact, the essence of the circuit conflict is a dispute over whether Rule 54(b) certification is required. *See Amicus* Br. 2-3. Whichever side is right, the principles at stake are significant, and the conflict therefore requires this Court's attention.

II. This Case As A Vehicle To Decide The Question Presented

This case is an ideal vehicle to illustrate how an immediate appeal makes both appellate and district court litigation more manageable. Respondents argue that an immediate appeal in this case will make the proceedings inefficient. But they fail to substantiate their rhetoric with any detail. *See* BIO 10-12 (citing literally nothing).

In fact, deciding petitioners' appeal now will speed the disposition of all the antitrust claims of all the LIBOR cases, which are on indefinite hold for no good reason. The district court's rationale for dismissing petitioners' complaint – that the manipulation of LIBOR cannot cause *any* plaintiff antitrust injury – applies equally to every possible plaintiff and every antitrust theory. Pet. App. 38a, 199a. For that reason, the court applied that ruling to dismiss every antitrust claim in every complaint that had been filed as of that date, even the stayed cases. Dkt. No. 286

(Mar. 29, 2013). It then permitted the non-stayed plaintiffs to join in petitioners' appeal as of right, finding that "*judicial efficiency would be served*" thereby. Pet. App. 220a (emphasis added).

This case also illustrates the inefficiency of the Second Circuit's rule. Because that court nominally applies a "strong presumption" without categorically barring immediate appeals, petitioners had to appeal the dismissal of their complaint or face the prospect of later being deemed to have appealed too late. *See, e.g.*, *Albert v. Maine Cent. R. Co.*, 898 F.2d 55 (1st Cir. 1990) (appellate ruling underlying the cert. grant in *Erickson*, *supra*). The court of appeals then had to consider the collateral dispute over whether the presumption was overcome. Then the district court had to resolve more collateral litigation over whether to grant Rule 54(b) certification, which it recently denied (Dkt. No. 551, at 78 (Feb. 25, 2014)) but which respondents believe should be repeated yet again (BIO 22). None of that moves the LIBOR litigation an inch closer to resolution.

The inefficiency will grow if the district court does not ultimately dismiss all the complaints, most of which it has not even begun to consider. The Second Circuit's rule forbids any plaintiff from appealing the dismissal of its complaint until the MDL is terminated by the conclusion of all the pre-trial proceedings for every complaint – including all the discovery. *See* 28 U.S.C. § 1407 (MDL consolidation terminates when pre-trial proceedings end). That development of the factual record would not inform this appeal, because it will not address the antitrust issues, which have been dismissed. Pet. App. 18a. The litigation will be

thrown into further disarray when the MDL ends because the cases will then be returned to their courts of origin, *see Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998), producing inefficient appeals to multiple circuits of the identical issue on the identical facts. If petitioners then prevail on their appeal, the merits and damages discovery from all of the many respondents will have to be redone in at least substantial part (and the MDL might have to be reconstituted), both because petitioners will not have participated in the prior round of discovery and because no discovery will have been taken on the facts that relate only to the antitrust claims.

III. Jurisdiction

This Court has jurisdiction because, at the very least, the Second Circuit "passed upon" the Question Presented. *United States v. Williams*, 504 U.S. 36, 41-44 (1992). Indeed, it was the *only* issue the court of appeals decided. The Second Circuit dismissed this appeal because other complaints remain pending in the MDL. Pet. App. 2a. The Order unambiguously is based on the absence of a "final order" under "28 U.S.C. § 1291," whereas "the orders appealed from did not dispose of all claims in the consolidated action." Pet. App. 2a. The Second Circuit then cited two decisions: *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978), which holds that an appealable "final order" is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment" (citation omitted); and *Houbigant, Inc. v. IMG Fragrance Brands, LLC*, 627 F.3d 497, 498 (2d

Cir. 2010) (per curiam), which applies a "strong presumption" that the dismissal of one of several consolidated cases is not appealable.[1]

Because the court of appeals "passed" on the Question Presented, it would make no difference if respondents were correct that petitioners supposedly had not separately "pressed" that question, because they "made none of the arguments that they now

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[1] In opposing rehearing below, respondents recognized (at 8) that the Second Circuit's Order was based on "precedent that promotes judicial economy by prohibiting piecemeal appeals in consolidated actions." They then advised the district court that the Second Circuit had dismissed the appeal for one reason: because "piecemeal review of multidistrict litigation is not appropriate." Dkt. No. 533, at 1 (Jan. 21, 2014). Ignoring those representations, respondents now attempt in a throwaway footnote to suggest that the Second Circuit "also appeared to rely on the fact that the district court did not enter judgment as required by Federal Rule of Civil Procedure 58." BIO 23 n.8. That assertion lacks any merit. As discussed in the text, the Second Circuit's Order is unambiguous. It does not mention either Rule 58 or any other point remotely related to whether the district court's judgment is "set out in a separate document [or] noted on the docket." *Id.* Nor could it. The district court expresaly provided on its docket that petitioners' complaint was "terminat[ed]." Pet. App. 12a. It then recognized petitioners' right to "appeal as of right because their complaint[] [was] dismissed in [its] entirety." *Id.* 220a. *See also* BIO 6 ("all of the claims . . . were dismissed"). The fact that the clerk forgot to enter the judgment on a separate piece of paper makes no difference: Rule 58 was amended in 2002 precisely to address this recurring scenario. Fed. R. Civ. P. 58(c)(2)(B) (when judgment is not "set out in a separate document," it is deemed entered when "150 days have run from the entry in the civil docket"); *see id.* Adv. Comm. Notes.

present to this Court" (BIO 9) and "never raised below the question that they now seek to present" (*id.* 12). But those statements are false in any event: the Second Circuit dismissed this appeal *sua sponte* before petitioners had the chance to submit *any* arguments (Pet. App. 2a), so petitioners squarely presented the issue to the Second Circuit at the first and *only* opportunity: by seeking rehearing (*see* Pet. 6-7).

Respondents' argument is instead that petitioners did not "press" the court of appeals to grant rehearing en banc to overturn its settled precedent and make the circuit conflict three to three to six rather than three to one to two to six. BIO 21-25. That is not what it means to "press" an issue in the court of appeals for purposes of this Court's jurisdiction. How could it? Parties are not even required to seek rehearing en banc to secure review in this Court (*see* 28 U.S.C. § 1251(1); S. Ct. R. 13) and they regularly do not (*e.g.*, Pet. for Cert., No. 13-7120, *Johnson v. United States* 3 ("No petition for rehearing was sought."), *cert. granted*, 134 S. Ct. 1871 (Apr. 21, 2014)). The circuit conflict is widespread and intractable, so that any en banc proceedings would have just delayed review in this Court.

IV. Mootness

There is no merit to respondents' suggestion that certiorari should be denied because this case could become moot while it is pending here. BIO 26. As respondents advised the Second Circuit, because most "of the cases in the multidistrict litigation have been stayed, and no discovery has taken place," there is "no indication" that they will be decided by the district

court and "remanded to other districts in the near future." Resp. Opp. to C.A. Rhg. 13.

In now arguing the opposite, respondents theorize that the district court's ruling on their presently pending motions to dismiss the non-stayed cases "might yield a final and appealable judgment." BIO 12 (citing nothing). That is simply false, and respondents omit two critical facts: (1) they have not even filed motions to dismiss the roughly forty *stayed* cases in the MDL that must also be decided before the Second Circuit will recognize an appealable judgment; and (2) because thirty-five of those complaints assert claims substantially different from those in the non-stayed cases, they cannot be resolved even indirectly by the motions now before the district court. *See* App. B, *infra*. So even on the assumption that respondents win the pending motions, they will then have to prepare and file new motions to dismiss the distinct claims in the stayed cases, and the plaintiffs will have to respond. The district court will then have to decide those new motions, as well as the losing parties' inevitable follow-on motions for reconsideration.

Respondents' suggestion that this entire process could take place so that the whole MDL will be done in the district court within a year – *i.e.*, before this Court would decide this case during its upcoming Term – is wildly implausible not only substantively (because it assumes the district court will dismiss each and every one of the complaints) but also chronologically. It took nine months to brief and initially resolve respondents' first motions to dismiss the non-stayed cases. Fourteen months later, the district court has not fully resolved the motions to reconsider that ruling. After

six months, it has not decided respondents' motions to dismiss the plaintiffs' amended pleadings. The delay is understandable, given that the pending motions raise intricate issues on multiple theories. When the district court finishes that process and the litigation finally begins over the roughly forty stayed cases, there is no reason to believe the case will move any faster.

Respondents finally assert that petitioners could moot the case themselves by seeking Rule 54(b) certification. BIO 22. There is a simple answer: while the case is pending in this Court, petitioners will not do that. Even if they did, respondents give no reason to believe the district court will reverse its ruling from just four months ago (Dkt. No. 551, at 78 (Feb. 25, 2014)) and grant certification this time. In any event, certification would not itself moot this appeal because the Second Circuit would have to decide respondents' inevitable argument that it lacks appellate jurisdiction because the certification was an abuse of discretion. *See, e.g., Wood v. GCC Bend, LLC*, 422 F.3d 873, 883 (9th Cir. 2005) (holding Rule 54(b) certification was unwarranted).

V. The Merits

Respondents complain that the Petition only discusses why this case is an ideal vehicle to resolve the four-way circuit conflict over the Question Presented, not why petitioners should prevail on the merits. BIO 19-20. Put another way, respondents urge this Court to deny review to send the message that although a brief does address every issue the Court's Rules say is important, *see* S. Ct. R. 10, it is

just too concise. That unusual argument answers itself. Respondents also ignore the detailed discussion of the merits in the *amicus* brief.

Substantively, respondents argue that the Second Circuit's rule is correct on the merits because district courts should decide when litigants appeal in consolidated cases. BIO 14-17. As discussed, this is an argument in favor of certiorari: if it is correct, the Court should grant the Petition and affirm, rejecting the contrary rule of the great majority of circuits.

In fact, the Court should grant certiorari and reverse. Although the "authority of trial courts to manage their own dockets cannot be disputed" (BIO 11), it equally cannot be disputed that trial courts do *not* have the authority to manage the dockets of the *courts of appeals*. Instead, Section 1291 gives the losing party the unqualified right to immediately appeal a "final decision." That provision applies here: petitioners did not appeal "the dismissal of their *claims*" (*contra* BIO 7 (emphasis added)); instead, the district court dismissed the *complaint*, which is a separate action within the MDL. *See Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933) ("[C]onsolidation . . . does not merge the suits into a single cause . . . ."); *Amicus* Br. 4-5.

By contrast, Rule 54(b) applies only upon the dismissal of a subset of the claims or parties in an "action." Fed. R. Civ. P. 54(b). Here, petitioners' "action" (Fed. R. Civ. P. 2) has been dismissed entirely, so Rule 54(b) does not apply. *See Amicus* Br. 6-7. Further, respondents would turn the Rule's purpose to *speed* appeals, not delay them, on its head. *See* Fed.

R. Civ. P. 54, Adv. Comm. Notes ("Rule 54(b) was originally adopted . . . to avoid the possible injustice of a delay in judgment of a distinctly separate claim to await adjudication of the entire case.").

Respondents' argument also depends on the premise that petitioners' right to appeal turns on a balancing of interests. But the discretionary appeal that can be sought under Rule 54(b) does not limit the unqualified statutory right to appeal conferred by Section 1291. Under the Rules Enabling Act, it could not. 28 U.S.C. § 2072(b). In any event, respondents point to no actual evidence that the longstanding majority rule permitting immediate appeals has produced any inefficiency. As discussed (Part II, *supra*), this case illustrates why in fact an immediate appeal saves judicial resources.

One reason the majority rule works well is courts always have the flexibility to control their dockets. A district court that concludes that consolidated complaints raise closely related issues will often (for that very reason) decide all the motions to dismiss them together. If the cases are decided together, they are then appealed together. And if unusual circumstances warrant, the court of appeals can stay an appeal until parallel litigation concludes in the district court. *See, e.g., In re Food Lion, Inc., Fair Labor Standards Act Effective Scheduling Litig.*, 73 F.3d 528, 533 (4th Cir. 1996).

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition and the *amicus* brief, certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Cases Raising The Question Presented

FIRST CIRCUIT

Evans v. Akers, 534 F.3d 65 (1st Cir. 2008).

Global NAPS, Inc. v. Verizon New England, Inc., 396 F.3d 16 (1st Cir. 2005).

Albert v. Main C. R. Co., 898 F.2d 5 (1st Cir. 1990).

FDIC v. Caledonia Inv. Corp., 862 F.2d 378 (1st Cir. 1988).

In re Massachusetts Helicopter Airlines, Inc., 469 F.2d 439 (1st Cir. 1972).

SECOND CIRCUIT

Houbigant, Inc. v. IMG Fragrance Brands, LLC, 627 F.3d 497 (2d Cir. 2010).

Kelly v. City of New York, 391 Fed. Appx. 69 (2d Cir. 2010).

Brewer v. Cootes Drive LLC, 98 Fed. Appx. 41 (2d Cir. 2004).

Kamerman v. Steinberg, 891 F.2d 424 (2d Cir. 1989).

Hageman v. City Investing Co., 851 F.2d 69 (2d Cir. 1988).

THIRD CIRCUIT

DaSilva v. Esmor Corr. Servs., Inc., 167 Fed. Appx. 303 (3d Cir. 2006).

United States v. $8,211,877.16 in U.S. Currency, 330 F.3d 141 (3d Cir. 2003).

Hall v. Wilkerson, 926 F.2d 311 (3d Cir. 1991).

Bergman v. City of Atlantic City, 860 F.2d 560 (3d Cir. 1988).

FIFTH CIRCUIT

In re: Katrina Canal Breaches Litig., 345 Fed. Appx. 1 (5th Cir. 2009).

McDermot Int'l, Inc. v. Underwriters at Lloyds, 981 F.2d 744 (5th Cir. 1993).

Road Sprinkler Fitters Local Union v. Continental Sprinkler Co., 967 F.2d 145 (5th Cir. 1992).

Ringwald v. Harris, 675 F.2d 768 (5th Cir. 1982).

SIXTH CIRCUIT

In re Refrigerant Compressors Antitrust Litig., 731 F.3d 586 (6th Cir. 2013).

InfoCision Mgmt. Corp. v. Found. for Moral Law, Inc., No. 10-4408, 2011 U.S. App. LEXIS 5922 (6th Cir. Jan. 19, 2011).

Nicholson v. City of Westlake, 20 Fed. Appx. 400 (6th Cir. 2001).

Florida State Bd. of Admin. v. Brick, Nos. 99-4173/74, 2000 U.S. App. LEXIS 1933 (6th Cir. Feb. 8, 2000).

Beil v. Lakewood Eng'g & Mfg. Co., 15 F.3d 546 (6th Cir. 1994).

SEVENTH CIRCUIT

Ward v. Oliver, Nos. 92-3406/07, 1994 U.S. App. LEXIS 4343 (7th Cir. Mar. 4, 1994).

EEOC v. Harris Chernin, Inc., 10 F.3d 1286 (7th Cir. 1993).

Arnold v. Indianapolis Airport Auth., No. 91-1889, 7 F.3d 238 (table), 1993 U.S. App. LEXIS 24860 (7th Cir. Sept. 21, 1993).

Brown v. United States, 976 F.2d 1104 (7th Cir. 1992).

EIGHTH CIRCUIT

Turner v. Turner, 469 Fed. Appx. 489 (8th Cir. 2012).

Tri-State Hotels v. FDIC, 79 F.3d 707 (8th Cir. 1996).

NINTH CIRCUIT

United States v. Sunset Ditch Co., 472 Fed. Appx. 472 (9th Cir. 2012).

Beverly v. Wolkowitz (In re Beverly), 551 F.3d 1092 (9th Cir. 2008).

Sues v. British Airways, 75 Fed. Appx. 636 (9th Cir. 2003).

Pollack v. Agusta, S.P.A., Nos. 96-55762/55768/55854/55881, 1997 U.S. App. LEXIS 28707 (9th Cir. Oct. 14, 1997).

Lasalle v. Streich Lang PA, No. 95-17079, 1997 U.S. App. LEXIS 16304 (9th Cir. June 30, 1997).

Fadem v. United States, 42 F.3d 533 (9th Cir. 1994), *vacating Fadem v. United States*, Nos. 92-56400/04/07, 1994 U.S. App. LEXIS 16079 (9th Cir. June 22, 1994).

Hines v. Board of Supervisors, Contra Costa County, No. 93-15870, 1993 U.S. App. LEXIS 22889 (9th Cir. Sept. 2, 1993).

Huene v. United States, 743 F.2d 703 (9th Cir. 1984).

TENTH CIRCUIT

Biocore, Inc. v. Khosrowshahi, 80 Fed. Appx. 619 (10th Cir. 2003).

Hillman v. Webley, No. 95-1513, 1996 U.S. App. LEXIS 25702 (10th Cir. Sept. 30, 1996).

Trinity Broadcasting Corp. v. Eller, 827 F.2d 673, *reh'g denied*, 835 F.2d 245 (10th Cir. 1987), *cert. denied*, 487 U.S. 1223 (1988).

ELEVENTH CIRCUIT

Fla. Wildlife Fed'n., Inc. v. Adm'r, U.S. Envtl. Prot. Agency, 737 F.3d 689 (11th Cir. 2013).

Schippers v. United States, 715 F.3d 879 (11th Cir. 2013).

D.C. CIRCUIT

Select Specialty Hospital-Augusta, Inc. v. Sebelius, Nos. 11-5129, 11-5131, 2011 U.S. App. LEXIS 19300 (D.C. Cir. Sept. 16, 2011).

Murthy v. Vilsack, 609 F.3d 460 (D.C. Cir. 2010).

United States ex rel. Hampton v. Columbia/HCA Healthcare Corp., 318 F.3d 214 (D.C. Cir. 2003).

FEDERAL CIRCUIT

Gemmy Indus. Corp. v. Chrisha Creations Ltd., 120 Fed. Appx. 368 (Fed. Cir. 2005).

Cavalier Clothes, Inc. v. United States, No. 01-5017, 2000 U.S. App. LEXIS 34490 (Fed. Cir. Dec. 26, 2000).

Hockerson-Halberstadt, Inc. v. Nike, Inc., No. 00-1344, 2000 U.S. App. LEXIS 20188 (Fed. Cir. July 20, 2000).

Petroscan AB v. Mobil Corp., No. 97-1380, 1997 U.S. App. LEXIS 21698 (Fed. Cir. July 16, 1997).

Spraytex, Inc. v. DJS&T & Homax Corp., 96 F.3d 1377 (Fed. Cir. 1996).

APPENDIX B

Claims That Differ Substantially From Claims In Existing Motions To Dismiss

Class Action Complaints

1. *Highlander Realty, LLC, et al. v. Citizens Bank of Mass., et al.*, 13-cv-2343 (S.D.N.Y.) (accounting, declaratory judgment, misrepresentation, fraud and deceit, promissory estoppel, unfair trade practices)

2. *Los Angeles County Employees Retirement Ass'n v. Bank of America Corp., et al.*, 13-cv-0398 (S.D.N.Y.) (interference with economic advantage)

3. *County of Riverside v. Bank of America Corp., et al.*, 13-cv-1135 (S.D.N.Y.) (violation of state antitrust laws, interference with economic advantage)

4. *Directors Financial Group v. Bank of America Corp., et al.*, 13-cv-1016 (S.D.N.Y.) (fraud)

5. *The Berkshire Bank , et al. v. Bank of America Corp., et al.*, 12-cv-5723 (S.D.N.Y.) (fraud)

6. *Carl A. Payne, et al. v. Bank of America Corp., et al.*, 13-cv-0598 (S.D.N.Y.) (violation of California consumer protection statute, fraud)

7. *Annie Bell Adams, et al. v. Bank of America Corp., et al.*, 12-cv-7461 (S.D.N.Y.) (violation of the Donnelly Act, declaratory and injunctive relief, tortious interference with business relationship)

8. *Jerry Weglarz, et al. v. JP Morgan Chase Bank, N.A., et al.*, 13-cv-1198 (S.D.N.Y.) (declaratory and equitable relief regarding obligations under contract, consumer fraud, common law fraud)

9. *Stephanie Nagel v. Bank of America, N.A., et al.*, 13-cv-3010 (S.D.N.Y.) (declaratory and equitable relief regarding obligations under contract, consumer fraud, common law fraud)

10. *Elizabeth Lieberman, et al. v. Credit Suisse Group AG, et al.*, 12-cv-6056 (S.D.N.Y.) (violation of state antitrust laws)

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AMICUS CURIAE BRIEF

No. 13-1174

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

ELLEN GELBOIM AND LINDA ZACHER, INDIVIDUALLY FOR THEMSELVES AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

CREDIT SUISSE GROUP AG, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF MAYOR AND CITY COUNCIL OF BALTIMORE, CITY OF NEW BRITAIN FIREFIGHTERS' AND POLICE BENEFIT FUND, TEXAS COMPETITIVE ELECTRIC HOLDINGS COMPANY, LLC, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, COUNTY OF SAN MATEO, THE SAN MATEO COUNTY JOINT POWERS FINANCING AUTHORITY, CITY OF RICHMOND, THE RICHMOND JOINT POWERS FINANCING AUTHORITY, SUCCESSOR AGENCY TO THE RICHMOND COMMUNITY REDEVELOPMENT AGENCY, CITY OF RIVERSIDE, THE RIVERSIDE PUBLIC FINANCING AUTHORITY, COUNTY OF SAN DIEGO, EAST BAY MUNICIPAL UTILITY DISTRICT, SAN DIEGO ASSOCIATION OF GOVERNMENTS, COUNTY OF SONOMA, DAVID E. SUNDSTROM, IN HIS OFFICIAL CAPACITY AS TREASURER FOR THE COUNTY OF SONOMA, AND COUNTY OF SACRAMENTO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are plaintiffs—including cities, pension funds, educational institutions, and corporations—that have filed actions concerning the manipulation of the London Interbank Offered Rate ("LIBOR"), currently pending in the United States District Court for the Southern District of New York (*In re LIBOR-Based Financial Instruments Antitrust Litig.*, No. 11-MD-2262). *Amici* Mayor and City Council of Baltimore, City of New Britain Firefighters' and Police Benefit Fund, and Texas Competitive Electric Holdings Company LLC purchased LIBOR-based instruments directly from one or more of the banks that served on the panel that set LIBOR. The district court designated their counsel as interim class counsel for a putative class of persons who purchased LIBOR-based instruments "over the counter"—that is, directly from the panel banks (the OTC plaintiffs). App. 9a. The OTC plaintiffs, like petitioners, have been consolidated for pretrial purposes with the other LIBOR-related class actions (Pet. App. 11a); *amici* thus have a strong interest in the rules governing appeals in cases subject to the consolidation order.

SUMMARY OF ARGUMENT

This case will enable this Court to resolve the conflict in the Courts of Appeals regarding whether a party in an action consolidated for pretrial purposes with other actions

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[1] *Amici* provided petitioners and respondents with timely notice of their intent to file this brief. All parties have consented to the filing of this brief; the parties' letters consenting to the filing of this brief have been filed with the Clerk's office. No counsel for a party has authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

may pursue an immediate appeal after a district court dismisses its action in full. The district court dismissed petitioners' complaint "in [its] entirety," Pet. App. 219a, without leave to replead, and judgment was deemed entered by operation of Federal Rule of Civil Procedure 58(c)(2)(B). Pet. 5. If petitioners' action were not consolidated for pretrial purposes with other actions, petitioners clearly would have the right to an immediate appeal.[2] *See* 28 U.S.C. § 1291 (courts of appeals have jurisdiction of "all final decisions of the district courts"). However, petitioners' action was consolidated for pretrial purposes under the authority of the multidistrict litigation statute (28 U.S.C. § 1407), Pet. App. 10a–11a, and in some Circuits (including the Second Circuit) consolidation has been held to impair one's appellate rights. As a result, petitioners could not appeal immediately in the Second Circuit (nor in the Federal, Ninth, and Tenth Circuits), but they could have done so in the D.C., First, Third, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits. Pet. 8–11.

This split is not new. It has existed for many years and drawn the attention of numerous commentators. *See, e.g.*, 10 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 54.29[7][a] (3d ed. 1999) (section heading, "Courts of Appeals Disagree Over Necessity of Rule 54(b) Certification in Consolidated Cases"); 10 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 2656 (3d ed. 1998) ("The circuits are divided on the question whether Rule 54(b) applies in a consolidated

---

[2] Petitioners' appeal would have raised the issue of whether the district court erred by holding that the LIBOR panel banks' alleged collusion to manipulate the LIBOR rate, which affected the price of trillions of dollars of financial instruments, did not cause an antitrust injury within the scope of Section 1 of the Sherman Act, 15 U.S.C. § 1. *See* Pet. App. 39a–59a.

action that does not dispose of all the claims . . . ."); Gaylord A. Virden, *Consolidation Under Rule 42 of the Federal Rules of Civil Procedure: The U.S. Courts of Appeals Disagree On Whether Consolidation Merges the Separate Cases and Whether the Cases Remain Separately Final for Purposes of Appeal*, 141 F.R.D. 169, 183–208 (1991). The split exists because some Courts of Appeals, including the Second Circuit, have ignored this Court's direction that "consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496–97 (1933). Neither the Federal Rules of Civil Procedure nor the multidistrict litigation statute (28 U.S.C. § 1407) treat multiple actions subject to a consolidation order as a single unified "action": rather, the Rules and 28 U.S.C. § 1407 use the term "action" to refer to a single lawsuit initiated by filing a complaint. The appeal certification procedure in Rule 54(b) is thus irrelevant: it applies only to "an action" with multiple claims or parties. Fed. R. Civ. P. 54(b). The Circuits that deny immediate appeals in situations such as petitioners' base their holdings on policy rather than statute or rule. And even as to policy, they fail to acknowledge that the concerns behind the policy against piecemeal review are absent in these situations, while the danger of delayed final adjudication—possibly by several years—is very real. The petition should be granted.

ARGUMENT

I. The dismissal of an action consolidated for pretrial purposes with other actions should be immediately appealable.

A. Consolidation is a procedural device to improve judicial economy; it does not transform multiple separate actions into a single action.

Consolidation—whether under Federal Rule of Civil Procedure 42(a), after a transfer pursuant to 28 U.S.C. § 1407, or similar statutes or doctrines—is a procedural device to improve judicial economy. It enables a court to deal efficiently with cases involving related issues, eliminating the need for duplicative proceedings across similar actions. *See Mutual Life Ins. Co. of New York v. Hillmon*, 145 U.S. 285, 292 (1892) (consolidation of actions that "appear[] to the court to be of like nature and relative to the same question" permitted in order to "avoid unnecessary cost and delay"); 8 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 42.10[1][a] (3d ed. 1999) (Rule 42(a) consolidation is a "managerial device" that "makes possible the streamlined processing of groups of cases").

Before the adoption of the Federal Rules of Civil Procedure, this Court made clear that a consolidation order did not extinguish the separate character of the consolidated actions. *See Johnson*, 289 U.S. at 496–97 ("[C]onsolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another."); *Hillmon*, 145 U.S. at 293 ("[A]lthough the defendants might lawfully be compelled, at the discretion of the court, to try the cases together, the causes of action remained distinct, and required separate verdicts and

judgments . . . ."). This Court thus permitted appeals from judgments that disposed of one or more but not all cases subject to a consolidation order. *See, e.g., United States v. River Rouge Improvement Co.*, 269 U.S. 411, 413–14 (1926); *Withenbury v. United States*, 72 U.S. 819, 821-22 (1866).

The Federal Rules of Civil Procedure did not change pre-Rules doctrine that consolidation does not merge separate lawsuits into one. The Rules established "one form of action": a "civil action" that is "commenced by filing a complaint with the court." Fed. R. Civ. P. 2, 3. Here, petitioners commenced their "action" by filing their complaint, just as the OTC plaintiffs commenced their own separate "action" by filing their own separate complaint. Rule 42(a) speaks of consolidation of "actions before the court," recognizing the actions' separate identities, and does not suggest that it intends to alter this Court's holdings and transform the separate actions subject to the consolidation order into a single "action." Rule 20(a), by contrast, speaks of joining parties "in one action": joinder, rather than consolidation, permits parties to be added to a single action.

The federal rules use the term "action" in ways that would make no sense if consolidation created a single unified "action" out of separate individual "actions." For example, a court may dismiss an "action" against a defendant who has not been served properly. Fed. R. Civ. P. 4(m). A defendant in two cases subject to a consolidation order, properly served in one but not the other, would not be able to secure dismissal of both cases; rather, the adequacy of service would be evaluated separately for each action. *See Greenberg v. Giannini*, 140 F.2d 550, 552 (2d Cir. 1944) (Hand, J.) (question of validity of service "must be decided as though the two actions had remained unconsolidated, because the order did not merge them . . . but was only a convenience, accomplishing no more than to obviate the duplication of

papers and the like."). A plaintiff may dismiss "an action" without a court order by securing a stipulation of dismissal "signed by all parties who have appeared." Fed. R. Civ. P. 41(a)(1)(A)(ii). The plaintiff can obtain such a dismissal with signatures from all parties appearing in the plaintiff's own action; she need not additionally secure the signatures of parties in all other actions subject to a consolidation order. *See United States v. Altman*, 750 F.2d 684, 695–97 (8th Cir. 1984) (quoting *Johnson*, 289 U.S. at 496–97); *State Mutual Life Assurance Co. v. Deer Creek Park*, 612 F.2d 259, 267 (6th Cir. 1979) (also quoting *Johnson*). A court must dismiss "the action" if it lacks subject-matter jurisdiction. Fed. R. Civ. P. 12(h)(3). But surely a district court need not dismiss every action subject to a consolidation order if it concludes it lacks jurisdiction over one; rather, it should consider its jurisdiction over each action separately, just as this Court does. *See Butler v. Dexter*, 425 U.S. 262, 267 n.12 (1976) ("This case was consolidated in the District Court with several other cases, at least some of which did bring into question the constitutionality of a state statute. Each case before this Court, however, must be considered separately to determine whether or not this Court has jurisdiction to consider its merits.").

Rule 54(b) is no different. Rule 54(b) relates to the appealability of orders in "an action" with more than one claim or party and provides that any order or decision "that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties" absent the district court's entry of a final judgment after determining there is no just reason for delay. Consistent with Rules 2 and 3, the "action" in Rule 54(b) is the single lawsuit. Rule 54(b) does not suggest that multiple actions subject to a consolidation order become a single "action" so a party cannot appeal a dismissal of its own action without a Rule 54(b) certification. Such a reading would be inconsistent

with Rule 54(b)'s purpose. Before the adoption of the Rules, the federal courts generally prohibited appeals from judgments that disposed of fewer than all claims in multiclaim cases, reasoning that the entire case (rather than the individual claims) was the "judicial unit" for appeal purposes. *See Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 431–32 & n.3 (1956). In pre-Rules multiparty cases, the federal courts would in some circumstances permit immediate appeals from judgments finally disposing of separate and distinct claims. *See id.* at 432 n.3. Rule 54(b) "authoriz[ed] a limited relaxation of the former general practice that, in multiple claims actions, all the claims had to be finally decided before an appeal could be entertained from a final decision upon any of them." *Id.* at 433–34. But the original Rule 54(b) did not refer explicitly to multiparty cases, which led to some courts denying Rule 54(b) appeals in such cases. *See* Fed. R. Civ. P. 54 advisory committee's note. Observing that "[t]he danger of hardship through delay of appeal until the whole action is concluded may be at least as serious in the multiple-parties situations as in multiple-claims cases," (*id.*), the rule was amended so it clearly covered multiparty cases. *Id.* Rule 54(b) thus expanded rather than contracted the categories of decisions subject to immediate appellate review (*Sears, Roebuck, & Co.*, 351 U.S. at 438): it does not suggest an intention to reverse this Court's holding about the nature of consolidation and, in the process, narrow the scope of appellate review.

The multidistrict litigation statute (28 U.S.C. § 1407) does not create a single unified "action" post-transfer out of many pre-transfer "actions." The statute authorizes transfer for "coordinated or consolidated pretrial proceedings" when such proceedings will be "for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407. The statute assumes the transferred actions retain

their individual identities: not only does it refer to "such actions" rather than a single unified "action" post-transfer, but at the conclusion of pretrial proceedings, "[e]ach action so transferred" is to be remanded for trial to the transferor court—a mandatory remand (*Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998)) that would make no sense if consolidation eliminated the separate natures of the pre-transfer actions.

The foregoing authorities demonstrate why immediate appeal is appropriate: (1) this Court held before the adoption of the Federal Rules of Civil Procedure and 28 U.S.C. § 1407 that consolidation does not merge multiple separate lawsuits into one; (2) neither the Rules nor the multidistrict litigation statute suggest any intent to modify this Court's holdings about the nature of consolidation; to the contrary, the Rules and the multidistrict litigation statute use the word "action" to refer to a single lawsuit, not the fictional agglomerated result of a consolidation order; (3) Rule 54(b) thus does not apply to petitioners' situation, as on its face it addresses only orders within a single "action," and therefore (4) the district court's dismissal of petitioners' action "in its entirety," with judgment deemed entered by operation of Federal Rule of Civil Procedure 58(c)(2)(B), Pet. 5, was an immediately appealable final decision under 28 U.S.C. § 1291, just as if petitioners' lawsuit had never been subject to a consolidation order.

B. Denying immediate appealability delays final adjudication without satisfying the goals of the policy against piecemeal review.

The Courts of Appeals that reject immediate appealability do not engage in any depth with these authorities. Instead, they rest their decision on policy considerations, primarily the policy against piecemeal

review. *See Spraytex, Inc. v. DJS&T*, 96 F.3d 1377, 1382 (Fed. Cir. 1996); *Hageman v. City Investing Co.*, 851 F.2d 69, 72 (2d Cir. 1988); *Huene v. United States*, 743 F.2d 703, 704 (9th Cir. 1984); *Trinity Broadcasting Corp. v. Eller*, 827 F.2d 673, 675 (10th Cir. 1987). But policy considerations cannot override a party's statutory appellate rights, especially where the result might be a delay of several years before an appeal—a very likely outcome in a large MDL proceeding such as the one below.

In any event, the Circuits' concerns about piecemeal review are misplaced. In contrast to the policy against piecemeal review in a single action, there is no similar policy against appellate review in distinct actions simply because the distinct actions may present related issues. The concerns this Court has expressed about piecemeal review are not present in an appeal in an action consolidated for pretrial purposes with other actions.

Piecemeal review of prejudgment decisions in a single action is disfavored because it creates inefficiency at the appellate level: it "risks additional, and unnecessary, appellate court work either when it presents appellate courts with less developed records or when it brings them appeals that, had the trial simply proceeded, would have turned out to be unnecessary." *Johnson v. Jones*, 515 U.S. 304, 309 (1995). But in situations such as petitioners', there will be no further trial court work in the dismissed action, and thus there is no risk that further developments in that action may render an appeal unnecessary or create a fuller record. The district court's decision "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin v. United States*, 324 U.S. 229, 233 (1945). To be sure, it is possible that developments in some other case may present the issues on appeal in a different light—but that is always true in any appeal, whether or not the case on appeal has been

consolidated. That possibility does not permit a court to disregard a party's statutory right to an appeal.

Piecemeal review within a single action tends to create delay: multiple appeals from various prejudgment decisions may delay the action from proceeding to a swift and final resolution in the trial court. "To be effective, judicial administration must not be leaden-footed. Its momentum would be arrested by permitting separate reviews of the component elements in a unified cause." *Cobbledick v. United States*, 309 U.S. 323, 324 (1940). *See Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 434 (1985) ("One purpose of the final judgment rule embodied in § 1291 is to avoid the delay that inherently accompanies time-consuming interlocutory appeals."). But actions such as petitioners' have already been dismissed in their entirety: an appeal will not delay their resolution because there is nothing left to resolve.

Finally, piecemeal review within a single action "encroaches upon the prerogatives of district court judges, who play a special role in managing ongoing litigation." *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106–07 (2009) (quotations omitted). "[T]he *district judge* has primary responsibility to police the prejudgment tactics of litigants, and . . . the district judge can better exercise that responsibility if the appellate courts do not repeatedly intervene to second-guess prejudgment rulings." *Richardson-Merrell*, 472 U.S. at 434. But in situations such as petitioners', the case is over: there can be no repeated second-guessing of prejudgment rulings because there will be no further rulings; there is only the final judgment. The appeal here will simply be "a single appeal . . . deferred until final judgment has been entered, in which the claims of district court error at any stage of the litigation may be ventilated." *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994).

This Court has summarized the competing policy considerations concerning appealability as "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950). Although the concerns implicated by the rule against piecemeal review are not present in situations such as petitioners', the danger of denying justice by delay is very real. The threshold for consolidation is low: there need only be "a common question of law or fact" for consolidation under Rule 42(a) and "one or more common questions of fact" for transfer under 28 U.S.C. § 1407 for coordinated or consolidated pretrial proceedings. A plaintiff may thus find herself consolidated with other actions with just a single question of fact—not burdensome if consolidation is, as this Court has explained, merely a procedural device to enhance judicial efficiency, but very problematic if the plaintiff's appeal rights are now hostage to the proceedings of every other action subject to the consolidation order, so that no one can pursue an appeal until everyone's case is finished. This could take years, contrary to the direction to construe the federal rules "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. Although this Court "decide[s] appealability for categories of orders rather than individual orders" and does "not now in each individual case engage in ad hoc balancing to decide issues of appealability" (*Johnson v. Jones*, 515 U.S. 304, 315 (1995)), petitioners' situation illustrates the harsh consequences of the Second Circuit's rule: litigation related to LIBOR involves many separate actions and damages that could be in the billions of dollars (Pet. App. 194a), raising the prospect that litigation could go on for many years before the last of the LIBOR-related cases is resolved and petitioners may, finally, pursue the appeal that they would

have had immediately, as a matter of right, had their case not been subject to a consolidation order.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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April 25, 2014

APPENDIX

APPENDIX

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In re: LIBOR-Based Financial Instruments Antitrust Litigation.

THIS DOCUMENT RELATES TO: All Cases

11 MD 2262 (NRB)

MEMORANDUM AND ORDER

Pursuant to this Court's October 18, 2011 Memorandum and Order, counsel seeking to serve as interim class counsel have presented the Court with supplemental submissions and revised leadership proposals. For the reasons discussed below, we appoint Hausfeld LLP ("Hausfeld") and Susman Godfrey LLP ("Susman Godfrey") as interim class counsel for the putative class of over-the-counter plaintiffs, and we appoint Kirby McInerney LLP ("Kirby McInerney") and Lovell Stewart Halebian Jacobson LLP ("Lovell Stewart") as interim class counsel for the putative class of exchange-based plaintiffs. We also grant the motion to consolidate related class action complaints.

BACKGROUND

This multi-district litigation involves twenty-three related complaints filed against member banks of the British Bankers' Association ("BBA") London Interbank Offer Rate ("LIBOR") Panel (collectively "defendants"). Plaintiffs in these cases allege that defendants artificially suppressed LIBOR by understating their borrowing costs to the BBA.

In our October 18, 2011 Memorandum and Order, we determined that even though all plaintiffs make similar substantive allegations, separate putative classes should be maintained for those plaintiffs who engaged in over-the-counter transactions and those plaintiffs who purchased financial instruments on an exchange. Because the record was unclear as to the proper classification of several of the plaintiffs, we requested that counsel inform us as to the plaintiffs they currently represent and whether those plaintiffs are over-the-counter purchasers or exchange-based purchasers. Counsel have now provided us with the requested information, and several firms have reorganized their leadership proposals to conform with our decision to maintain separate putative classes.

DISCUSSION

I. Interim Class Counsel Proposals

Previously, the law firms of Grant & Eisenhofer PA ("Grant & Eisenhofer"), Kirby McInerney, Robbins Geller Rudman & Dowd LLP ("Robbins Geller"), and Lovell Stewart had submitted a proposal under which the four firms would act as interim class counsel for both categories of plaintiffs. These firms have now divided, with two of the firms proposing to represent over-the-counter plaintiffs and the other two seeking to represent exchange-based plaintiffs. We are separately presented with an additional class counsel proposal for each of the putative classes. Thus, we are now faced with two proposals with respect to each putative class of plaintiffs.

A. Over-the-Counter Plaintiffs[1]

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[1] We have also received a motion for appointment as interim class counsel from the law firms of Scott & Scott LLP and Robbins, Kaplan, Miller & Ciresi LLP. These firms seek to represent a putative class of plaintiffs that engaged in interest rate swaps only. This motion

1. Grant & Eisenhofer Proposal

Grant & Eisenhofer and Robbins Geller – previously part of the four-firm proposal – now seek to represent the putative class of over-the-counter plaintiffs ("Grant & Eisenhofer Proposal"). Robbins Geller currently represents two institutional plaintiffs, Carpenters Pension Fund of West Virginia and City of Dania Beach Police & Firefighters Retirement System, that purchased floating rate debt tied to LIBOR from one or more of the defendants. Grant & Eisenhofer currently represents Ravan Investments, LLC ("Ravan"), an institutional plaintiff that entered into unspecified types of over-the-counter transactions with defendant UBS. The Grant & Eisenhofer Proposal is also supported by plaintiff's counsel in Insulators & Asbestos Workers Local 14 v. Bank of Am. Corp., No. 11 civ. 3781 (S.D.N.Y.).

2. Baltimore Proposal

Hausfeld and Susman Godfrey submit a competing proposal with respect to the over-the-counter plaintiffs ("Baltimore Proposal"). These firms currently represent the Mayor and City Council of Baltimore in connection with Baltimore's having entered into "hundreds of millions of dollars" of interest rate swaps with defendants.

B. Exchange-Based Plaintiffs

1. Kirby McInerney Proposal

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was submitted on November 15, 2011, roughly two and a half months after the deadline we set for counsel to submit motions for appointment as interim class counsel. We deny these firms' motion on this ground alone, but we also note that after reviewing the firms' submissions, we disagree that there is a need for separate putative class treatment for plaintiffs who engaged in different forms of over-the-counter transactions.

Kirby McInerney and Lovell Stewart – the other two firms in the previous four-firm proposal – now seek to represent the putative class of exchange-based plaintiffs ("Kirby McInerney Proposal"). Kirby McInerney currently represents two foreign institutional investors, FTC Capital GmbH and Metzler Investment GmbH, that purchased exchange-based derivatives. Lovell Stewart currently represents Roberto E. Calle Gracey, an individual investor who purchased LIBOR-based futures contracts on the Chicago Mercantile Exchange. The Kirby McInerney Proposal also has the support of plaintiffs in six of the other cases pending before this Court.[2]

2. Lowey Dannenberg Proposal

The law firm Lowey Dannenberg Cohen & Hart PC ("Lowey Dannenberg") also seeks to be appointed interim class counsel for the exchange-based plaintiffs. In the initial round of submissions on this issue, Lowey Dannenberg did not actually apply to serve as interim class counsel, but rather acquiesced to the previously referenced four-firm proposal, under which Lowey Dannenberg would have served as a "designated fiduciary" for exchange-based plaintiffs. Lowey Dannenberg currently represents Jeffrey Laydon and Richard Hershey, two individual investors who purchased LIBOR-based futures contracts.

II. Interim Class Counsel Selection

Rule 23(g) of the Federal Rules of Civil Procedure allows a court to "designate interim counsel to act on behalf of a putative class before determining whether to

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[2] These plaintiffs are 303030 Trading LLC, Atlantic Trading USA, LLC, AVP Properties LLC, Independence Trading Inc., Gary Francis, and Nathanial Haynes.

certify the action as a class action." Fed. R. Civ. P. 23(g)(3). The designation of interim class counsel is especially encouraged in cases such as the instant matter where there are multiple, overlapping class actions that require extensive pretrial coordination. See In re Air Cargo Shipping Servs. Antitrust Litig., 240 F.R.D. 56, 57 (E.D.N.Y. 2006) (citing MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.11 (2004)).

The considerations set out in Rule 23(g)(1)(A), which govern the appointment of class counsel once a class is certified, are widely accepted to apply to the designation of interim class counsel before certification as well. See id.; see also Walker v. Discover Fin. Servs., No. 10-cv-6994, 2011 WL 2160889, at *2 (N.D. Ill. May 26, 2011). These criteria include: (1) the work counsel has done in identifying or investigating potential claims; (2) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will devote to representing the class. Fed. R. Civ. P. 23(g)(1)(A).

Unfortunately, the application of these factors does not guide us to a particular result in this case. All of the firms submitting applications have extensive experience in complex litigation, and we are more than confident that they have adequate knowledge of the applicable law. In addition, we have little doubt that the firms would each devote significant resources to prosecuting plaintiffs' claims. Finally, although certain of the firms may have brought suit earlier than others, all of the firms have demonstrated that they have thoroughly investigated the relevant claims, rendering this factor not determinative. We are therefore forced to rely on other case-specific factors to choose between the competing proposals.

A. Over-the-Counter Plaintiffs

Although the Grant & Eisenhofer Proposal carries the support of a greater number of plaintiffs, the Baltimore Proposal has the support of a plaintiff with by far the greatest economic interest. As previously referenced, the Mayor and City Council of Baltimore claim that Baltimore entered into hundreds of millions of dollars of interest rate swaps with defendants. Plaintiffs supporting the Grant & Eisenhofer Proposal do not allege to have held anywhere near this level of exposure. Furthermore, the market for interest rate swaps in general constitutes an extremely high percentage of the overall market for over-the-counter LIBOR-based transactions. Counsel for Baltimore present data suggesting that the worldwide nominal value of LIBOR-based interest rate swaps – $300 million as of September 2008 – is nearly thirty times the market for LIBOR-based debt (which is the market in which plaintiffs represented by Robbins Geller participated).[3] While this case is not governed by the Private Securities Litigation Reform Act of 1995, and therefore we are not guided entirely by the magnitude of a plaintiff's economic interest, we nevertheless find this consideration highly relevant.

We also find persuasive the fact that Hausfeld maintains an office in London with a full-time staff of at least five solicitors. Given that the case appears to involve extremely complicated factual issues, we believe that having dedicated and locally trained attorneys at the site of the core operative facts could prove extremely beneficial.

Finally, although less important to our determination, we note that Hausfeld and Susman Godfrey have only

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[3] As previously described, Grant & Eisenhofer has not specified the type of over-the-counter transactions entered into by its client, Ravan. However, even if Ravan did enter into interest rate swaps, we safely assume that the size of its holdings did not approach that of Baltimore's.

ever sought to represent over-the-counter plaintiffs, while Grant & Eisenhofer and Robbins Geller previously sought to represent exchange-based plaintiffs as well. Although we have no doubt that the latter two firms would zealously pursue the interests of over-the-counter plaintiffs were we to appoint them, there is some possibility that these plaintiffs could be prejudiced by their counsel having minimized the antitrust standing questions facing the exchange-based plaintiffs, and more generally from having suggested that all plaintiffs should be treated in a like manner.

Based on these considerations, we appoint Hausfeld and Susman Godfrey as interim class counsel for the putative class of over-the-counter plaintiffs.

B. Exchange-Based Plaintiffs

Our decision with respect to interim class counsel for the exchange-based plaintiffs is less difficult. Kirby McInerney and Lovell Stewart currently represent two institutional plaintiffs and one individual plaintiff, and the firms' proposal has the support of plaintiffs in six other cases. In contrast, Lowey Dannenberg currently represents just two individual plaintiffs and its proposal has the support of no other plaintiffs. The diversity and sheer number of plaintiffs supporting the Kirby McInerney Proposal are compelling factors in favor of their appointment.

We also find that Kirby McInerney and Lovell Stewart have adequately addressed the Article III standing issues raised by Lowey Dannenberg with respect to the foreign plaintiffs represented by Kirby McInerney. With that said, we caution that if any representation made by Kirby McInerney and Lovell Stewart on this issue is found to be inaccurate, and the proposed plaintiffs lack standing as a result, Kirby McInerney and Lovell Stewart will be

removed as lead counsel and Lowey Dannenberg will be substituted.[4]

Subject to this proviso, we appoint Kirby McInerney and Lovell Stewart as interim class counsel for the exchange-based plaintiffs.

III. Consolidation

We have also been presented a motion to consolidate the related class action complaints before this Court.[5] (Docket no. 10 at 22-25.)

Consolidation of actions under Federal Rule of Civil Procedure 42(a) is appropriate when "actions before the court involve a common question of law or fact." Fed. R. Civ. P. 42(a). Here, there is substantial overlap in defendants across the cases, and the underlying factual issues presented are seemingly identical – namely whether these defendants deliberately manipulated LIBOR. The legal issues presented are also common across the complaints, as the cases to be consolidated all involve claims under the Sherman Antitrust Act and/or the Commodity Exchange Act.

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[4] This Court experienced the waste and delay that occurs when a proposed plaintiff is found to lack standing in In re IMAX Securities Litigation, 06 Civ. 6128 (S.D.N.Y.). We have no interest in reliving that experience when the issue of standing has been raised up front.

[5] The motion does not seek consolidation of three cases not filed as class action complaints that were transferred to this Court by the Judicial Panel of Multi-district Litigation ("JPML") on September 14, 2011: Schwab Money Market Fund v. Bank of America Corp., No. 11 Civ. 6412 (N.D. Cal.); Charles Schwab Bank v. Bank of America Corp., No. 11 Civ. 6411 (N.D. Cal.); Schwab Short-Term Bond Market Fund v. Bank of America Corp., No. 11 Civ. 6409 (N.D. Cal.) Accordingly, we do not consolidate these actions with the related class action complaints.

We therefore consolidate all related class action complaints pending before this Court, as well as any future class action complaints alleging similar conduct and raising the same legal claims.

CONCLUSION

For the foregoing reasons, we hereby order: (1) that the LIBOR-related class action complaints currently pending before this Court be consolidated for all purposes under Federal Rule of Civil Procedure 42(a),[6] under the following caption: In Re: Libor-Based Financial Instruments Antitrust Litigation, Master File No. 1:11-md-02262-NRB; (2) that the law firms of Hausfeld LLP and Susman and Godfrey LLP are appointed to serve as interim class counsel for the putative class of over-the-counter plaintiffs; (3) that the law firms of Kirby McInerney LLP and Lovell Stewart Halebian Jacobson LLP are appointed to serve as interim class counsel for the putative class of exchange-based plaintiffs; and (4) within 20 days, interim class counsel shall submit to this Court a proposed order to facilitate their representation of the putative classes and to advance the conduct and progress of the litigation.[7]

SO ORDERED.

NAOMI REICE BUCHWALD

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[6] The captions of these cases are: 11 Civ. 2613; 11 Civ. 2883; 11 Civ. 3128; 11 Civ. 3249; 11 Civ. 3423; 11 Civ. 3781; 11 Civ. 3925; 11 Civ. 4421; 11 Civ. 4736; 11 Civ. 5450; 11 Civ. 5638; 11 Civ. 5640; 11 Civ. 5641; 11 Civ. 5927; 11 Civ. 5928; 11 Civ. 5929; 11 Civ. 5930; 11 Civ. 5931; 11 Civ. 7676; 11 Civ. 7715.

[7] If counsel believes that the litigation would benefit from an in-person conference before the Court to discuss the next steps to be taken in the litigation, they are invited to contact the Court so informing us.

UNITED STATES DISTRICT
JUDGE

Dated: New York, New York
November 29, 2011

JOINT APPENDIX

No. 13-1174

IN THE

Supreme Court of the United States

ELLEN GELBOIM AND LINDA ZACHER,
INDIVIDUALLY FOR THEMSELVES AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

BANK OF AMERICA CORPORATION ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

JOINT APPENDIX

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Certiorari granted June 30, 2014

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 13-3565(L); 13-3636 (Con)

In Re: Libor Based Financial Instruments Antitrust Litigation

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Date	#	Docket Text
09/19/2013	1	NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellant Ellen Gelboim and Linda Zacher, FILED. [1051262] [13-3565]
09/25/2013	8	NOTICE OF CIVIL APPEAL, with district court docket, on behalf of Appellant Charles Schwab & Co., inc., Charles Schwab Bank, N.A., Charles Schwab Corporation, Schwab Advisor Cash Reserves, Schwab Cash Reserves, Schwab Investor Money Fund, Schwab Money Market Fund, Schwab Retirement Advantage Money Fund, Schwab Short-Term Bond Market Fund, Schwab Total Bond Market Fund, Schwab U.S. Dollar Liquid Assets Fund, Schwab Value Advantage Money Fund, Schwab Yieldplus Fund and Schwab Yieldplus Fund Liquidation Trust, FILED. [1054359] [13-3636]

09/30/2013	12	NEW CASE 13-3636, on behalf of [Schwab entities listed in docket entry 11], FILED.[1054422] [13-3565]
10/30/2013	120	ORDER, dated 10/30/2013, for sua sponte dismissal of appeals, by JAC, BDP, FILED. [1079538] [13- 3565, 13-3636]
10/30/2013	121	APPEAL, pursuant to court order, dated 10/30/2013, DISMISSED. [1079541] [13-3565, 13-3636]
11/13/2013	129	MOTION, to reconsider, on behalf of Appellant [Schwab entities listed in docket entry 11] in 13-3636, 13-3565, FILED. Service date 11/13/2013 by CM/ECF. [1091587] [13-3636, 13-3565]
11/13/2013	130	MOTION, to reconsider, on behalf of Appellant Ellen Gelboim and Linda Zacher, FILED. Service date 11/13/2013 by CM/ECF. [1091597] [13-3565, 13-3636]
11/15/12013	132	DEFECTIVE DOCUMENT, motion to reconsider and to reinstate the appeal, [130], [129], on behalf of Appellant [Schwab entities listed in docket entry 11], Ellen Gelboim, . . . and Linda Zacher in 13-3565, FILED.[1093072] [13-3565, 13-3636]
11/15/2013	133	MOTION, to reconsider, to reinstate appeal, on behalf of Appellant [Schwab entities listed in docket

		entry 11] in 13-3636, 13-3565, FILED. Service date 11/15/2013 by CM/ECF. [1093433] [13-3636, 13-3565]
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11/27/2013	141	OPPOSITION TO MOTION to reconsider [134],to reinstate appeal [134], to reconsider [133],to reinstate appeal [133], on behalf of Appellee Barclays Bank Plc., FILED. Service date 11/27/2013 by CM/ECF. [1103091][141] [13-3565, 13-3636]
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12/09/2013	145	REPLY TO OPPOSITION [141], on behalf of Appellant [Schwab entities

		listed in docket entry 11] in 13-3636, 13-3565, FILED. Service date 12/09/2013 by CM/ECF. [1110421][145] [13-3636, 13-3565]
12/16/2013	149	MOTION ORDER, denying motion to reconsider [134] filed by Appellant Ellen Gelboim and Linda Zacher in 13-3565, denying motion to reconsider [133] filed by Appellant [Schwab entities listed in docket entry 11] in 13-3565; denying motion to reinstate appeal [134] filed by Appellant Ellen Gelboim and Linda Zacher in 13-3565, denying motion to reinstate appeal [133] filed by Appellant [Schwab entities listed in docket entry 11] in 13-3565, by JAC, BDP, FILED. [1115743][149] [13-3565, 13-3636]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CASE #: 1:12-cv-01025-NRB

Gelboim v. Credit Suisse Group AG et al

Relevant Docket Entries (Gelboim Case)

Date	#	Docket Text
02/09/2012	1	COMPLAINT against Bank of America Corporation, Bank of Tokyo-Mitsubishi UFJ, Barclays Bank PLC, Citibank NA, Credit Suisse Group AG, Deutsche Bank AG, HSBC Holdings plc., J.P. Morgan Chase & Co., Lloyds Banking Group plc, Rabobank Group, Royal Bank of Canada, Royal Bank of Scotland Group plc, Societe Generale, The Norinchukin Bank, UBS AG, WestLB AG. (Filing Fee $ 350.00, Receipt Number 465401029250) Document filed by Ellen Gelboim. (rdz) (Entered: 02/14/2012)
03/20/2012		CONSOLIDATED MDL CASE: Create association to 1:11-md-02262-NRB. (pgu) (Entered: 03/20/2012)
03/20/2012	11	NOTICE OF CASE ASSIGNMENT to Judge Naomi Reice Buchwald. Judge Unassigned is no longer assigned to the case. (pgu) (Entered: 03/20/2012)

04/30/2012	12	FIRST AMENDED COMPLAINT amending 1 Complaint, against [Defendants named in docket entry 1] by Ellen Gelboim, Linda Zacher. Related document: 1 Complaint, filed by Ellen Gelboim.***Original document is filed in case number 11-md-2262, document #131. (mro) (ama). (Entered: 05/01/2012)
06/29/2012	25	MOTION to Dismiss *the Amended Complaints*. Document filed by [Defendants named in docket entry 1] In Associated Cases: 1:11-md-02262-NRB et al. (Wise, Robert) (Entered: 06/29/2012)
06/29/2012	26	MEMORANDUM OF LAW in Support re: (112 in 1:11-cv-06411-NRB, 25 in 1:12- cv-01025-NRB, 165 in 1:11-md-02262-NRB, 108 in 1:11-cv-06409-NRB, 89 in 1:11-cv-02613-NRB, 118 in 1:11-cv-06412-NRB, 51 in 1:11-cv-05450-NRB) MOTION to Dismiss *the Amended Complaints*.. Document filed by [Defendants named in docket entry 1] Filed In Associated Cases: 1:11-md-02262-NRB et al. (Wise, Robert) (Entered: 06/29/2012)
06/29/2012	27	DECLARATION of Robert F. Wise, Jr. in Support re: (165 in 1:11-md-02262-NRB, 89 in 1:11-cv-02613-NRB, 118 in 1:11-cv-06412-NRB, 51 in 1:11-cv-05450-NRB, 112 in 1:11-cv-

		06411-NRB, 25 in 1:12-cv-01025-NRB, 108 in 1:11-cv-06409-NRB) MOTION to Dismiss *the Amended Complaints*.. Document filed by [Defendants named in docket entry 1]. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)Filed In Associated Cases: 1:11-md-02262-NRB et al. (Wise, Robert) (Entered: 06/29/2012)
06/29/2012	29	SUPPLEMENTAL MEMORANDUM OF LAW in Support re: (112 in 1:11-cv- 06411-NRB, 25 in 1:12-cv-01025-NRB, 165 in 1:11-md-02262-NRB, 108 in 1:11-cv-06409-NRB, 89 in 1:11-cv-02613-NRB, 118 in 1:11-cv-06412-NRB, 51 in 1:11-cv-05450-NRB) MOTION to Dismiss *the Amended Complaints*.. Document filed by Bank of Tokyo-Mitsubishi UFJ Ltd. Filed In Associated Cases: 1:11-md-02262-NRB et al. (Libow, Daryl) (Entered: 06/29/2012)
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		(Attachments: # 1 Exhibit No. 1, # 2 Exhibit No. 2)Filed In Associated Cases: 1:11-md-02262-NRB et al. (Libow, Daryl) (Entered: 06/29/2012)
06/29/2012	31	SUPPLEMENTAL MEMORANDUM OF LAW in Support re: 25 MOTION to Dismiss *the Amended Complaints*.. Document filed by Credit Suisse Group AG. (Washer, Herbert) (Entered: 06/29/2012)
06/30/2012	32	MOTION to Dismiss. Document filed by UBS AG, UBS AG. Filed In Associated Cases: 1:11-md-02262-NRB et al. (Sullivan, Peter) (Entered: 06/30/2012)
06/30/2012	33	MEMORANDUM OF LAW in Support re: (58 in 1:11-cv-05450-NRB, 127 in 1:11- cv-06412-NRB, 117 in 1:11-cv-06409-NRB, 32 in 1:12-cv-01025-NRB, 18 in 1:11- cv-07676-NRB, 178 in 1:11-md-02262-NRB, 121 in 1:11-cv-06411-NRB) MOTION to Dismiss.. Document filed by UBS AG, UBS AG. Filed In Associated Cases: 1:11- md-02262-NRB et al. (Sullivan, Peter) (Entered: 06/30/2012)
06/30/2012	34	DECLARATION of Lawrence J. Zweifach in Support re: (32 in 1:12-cv-01025-NRB, 18 in 1:11-cv-07676-NRB, 178 in 1:11-md-02262-NRB, 121 in 1:11-cv-06411-NRB, 58 in 1:11-cv-05450-NRB, 127 in 1:11-cv-06412-NRB, 117 in 1:11-cv-06409-NRB)

		MOTION to Dismiss.. Document filed by UBS AG, UBS AG. (Attachments: # 1 Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5) Filed In Associated Cases: 1:11-md-02262-NRB et al. (Zweifach, Lawrence) (Entered: 06/30/2012)
07/18/2012	37	MEMORANDUM AND ORDER: Accordingly, we reverse our previous consolidation order pursuant to Rule 42(a) and instead consolidate the class action complaints pending in the MDL for pretrial purposes only. (Signed by Judge Naomi Reice Buchwald on 7/18/2012) Filed In Associated Cases: 1:11-md-02262-NRB et al. (lmb) (Entered: 07/18/2012)
08/14/2012	38	PRETRIAL ORDER NO. 2: Consolidation and Coordination of Bondholder Plaintiff Actions I. Ellen Gelboim and Linda Zacher v. Credit Suisse Group AG, et al, Case No. 12 CV 1025 (NRB), is designated as the lead action for all class actions brought on behalf of holders of LIBOR-based debt securities not issued by any Defendant ("Bondholder Plaintiff Action") that may hereafter be filed in or transferred to the Court as related to In re LIBOR-Based Financial Instruments Antitrust Litigation,

		MDL No. 2262. (Signed by Judge Naomi Reice Buchwald on 8/14/2012) (djc) (Entered: 08/14/2012)
09/27/2012	39	REPLY MEMORANDUM OF LAW in Support re: 25 MOTION to Dismiss *the Amended Complaints. of Plaintiffs' Antitrust Claims.* Document filed by [Defendants named in docket entry 1]. (Wise, Robert) (Entered: 09/27/2012)
09/27/2012	40	SUPPLEMENTAL REPLY MEMORANDUM OF LAW in Support re: 25 MOTION to Dismiss *the Amended Complaints.*. Document filed by Bank of Tokyo-Mitsubishi UFJ, Credit Suisse Group AG. (Washer, Herbert) (Entered: 09/27/2012)
09/27/2012	41	DECLARATION of Robert F. Wise, Jr. in Support re: 25 MOTION to Dismiss *the Amended Complaints.*. Document filed by [Defendants named in docket entry 1]. (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Wise, Robert) (Entered: 09/27/2012)
09/27/2012	42	REPLY MEMORANDUM OF LAW in Support re: 32 MOTION to Dismiss.. Document filed by UBS AG. (Zweifach, Lawrence) (Entered: 09/27/2012)

03/29/2013	43	MEMORANDUM AND ORDER granting in part and denying in part 25 Motion to Dismiss; terminating pursuant to instructions from Chambers; 32 Motion to Dismiss. For the reasons stated above, defendants motions to dismiss are granted in part and denied in part. First, defendants motion to dismiss plaintiffs federal antitrust claim is granted. Regardless of whether defendants conduct constituted a violation of the antitrust law "antitrust injury." An antitrust injury is an injury that results from an anticompetitive aspect of defendants conduct. Here, although plaintiffs have alleged that defendants conspired to suppress LIBOR over a nearly three-year-long period and that they were injured as a result, they have not alleged that their injury resulted from any harm to competition. The process by which banks submit LIBOR quotes to the BBA is not itself competitive, and plaintiffs have not alleged that defendants conduct had an anticompetitive effect in any market in which defendants compete. Because plaintiffs have not alleged an antitrust injury, their federal antitrust claim is dismissed. Second, defendants' motion to dismiss plaintiffs' commodities manipulation

		claims is granted in part and denied in part. Contrary to defendants' arguments, plaintiffs' claims do not involve an impermissible extraterritorial application of the CEA, and plaintiffs have adequately pleaded their claims. However, certain of plaintiffs' claims are time-barred because numerous articles published in April and May 2008 in prominent national publications placed plaintiffs on notice of their injury. Therefore, plaintiffs commodities manipulation claims based on contracts entered into between August 2007 and May 29, 2008, are time-barred. However, plaintiffs claims based on contracts entered into between April 15, 2009, and May 2010 are not time-barred, and plaintiffs' claims based on contracts entered into between May 30, 2008, and April 14, 2009, may or may not be barred, though we will not dismiss them at this stage. Additionally, because the Barclays settlements brought to light information that plaintiffs might not previously have been able to learn, we grant plaintiffs leave to move to amend their complaint to include allegations based on such information, provided that any such motion addresses the concerns raised

		herein and is accompanied by a proposed second amended complaint. Third, defendants' motion to dismiss plaintiffs' RICO claim is granted. For one, the PSLRA bars plaintiffs from bringing a RICO claim based on predicate acts that could have been the subject of a securities fraud action. Here, the predicate acts of mail and wire fraud underlying plaintiffs' RICO claim could have been the subject of a claim for securities fraud. Additionally, RICO applies only domestically, meaning that the alleged enterprise must be a domestic enterprise. However, the enterprise alleged by plainttiffs is based in England. For these reasons, plaintiffs RICO claim is dismissed. Finally, plaintiffs' state-law claims are all dismissed, some with prejudice and some without. Plaintiffs' Cartwright Act claim is dismissed with prejudice for lack of antitrust injury. The exchange-based plaintiffs' New York common law unjust enrichment claim is also dismissed with prejudice, as plaintiffs have not alleged any relationship between them and defendants. With regard to the remaining state-law claims, we decline to exercise supplemental jurisdiction and [w]e recognize that it

might be unexpected that we are dismissing a substantial portion of plaintiffs claims, given that several of the defendants here have already paid penalties to government regulatory agencies reaching into the billions of dollars. However, these results are not as incongruous as they might seem. Under the statutes invoked here, there are many requirements that private plaintiffs must satisfy, but which government agencies need not. The reason for these differing requirements is that the focuses of public enforcement and private enforcement, even of the same statutes, are not identical. The broad public interests behind the statutes invoked here, such as integrity of the markets and competition, are being addressed by ongoing governmental enforcement. While public enforcement is often supplemented by suits brought by private parties acting as "private attorneys general," those private actions which seek damages and attorneys fees must be examined closely to ensure that the plaintiffs who are suing are the ones properly entitled to recover and that the suit is, in fact, serving the public purposes of the laws being invoked. Therefore, although we are fully cognizant of the settlements that

		several of the defendants here have entered into with government regulators, we find that only some of the claims that plaintiffs have asserted may properly proceed. (Signed by Judge Naomi Reice Buchwald on 3/29/2013) (tro) Modified on 4/2/2013 (tro). (Entered: 03/29/2013)
03/29/2013	47	MEMORANDUM AND ORDER: For the reasons stated above, defendants' motions to dismiss are granted in part and denied in part. First, defendants motion to dismiss plaintiffs' federal antitrust claim is granted. Regardless of whether defendants' conduct constituted a violation of the antitrust law "antitrust injury." An antitrust injury is an injury that results from an anticompetitive aspect of defendants conduct. Here, although plaintiffs have alleged that defendants' conspired to suppress LIBOR over a nearly three-year-long period and that they were injured as a result, they have not alleged that their injury resulted from any harm to competition. The process by which banks submit LIBOR quotes to the BBA is not itself competitive, and plaintiffs have not alleged that defendants' conduct had an anticompetitive effect in any market in which defendants compete.

		Because plaintiffs have not alleged an antitrust injury, their federal antitrust claim is dismissed. Second, defendants' motion to dismiss plaintiffs' commodities manipulation claims is granted in part and denied in part. Contrary to defendants' arguments, plaintiffs' claims do not involve an impermissible extraterritorial application of the CEA, and plaintiffs have adequately pleaded their claims. However, certain of plaintiffs' claims are time-barred because numerous articles published in April and May 2008 in prominent national publications placed plaintiffs on notice of their injury. Therefore, plaintiffs commodities manipulation claims based on contracts entered into between August 2007 and May 29, 2008, are time-barred. However, plaintiffs' claims based on contracts entered into between April 15, 2009, and May 2010 are not time-barred, and plaintiffs' claims based on contracts entered into between May 30, 2008, and April 14, 2009, may or may not be barred, though we will not dismiss them at this stage. Additionally, because the Barclays settlements brought to light information that plaintiffs might not previously have been able to learn,

		we grant plaintiffs leave to move to amend their complaint to include allegations based on such information, provided that any such motion addresses the concerns raised herein and is accompanied by a proposed second amended complaint. Third, defendants' motion to dismiss plaintiffs' RICO claim is granted. For one, the PSLRA bars plaintiffs from bringing a RICO claim based on predicate acts that could have been the subject of a securities fraud action. Here, the predicate acts of mail and wire fraud underlying plaintiffs' RICO claim could have been the subject of a claim for securities fraud. Additionally, RICO applies only domestically, meaning that the alleged enterprise must be a domestic enterprise. However, the enterprise alleged by plaintiffs is based in England. For these reasons, plaintiffs RICO claim is dismissed. Finally, plaintiffs' state-law claims are all dismissed, some with prejudice and some without. Plaintiffs' Cartwright Act claim is dismissed with prejudice for lack of antitrust injury. The exchange-based plaintiffs' New York common law unjust enrichment claim is also dismissed with prejudice, as plaintiffs have not alleged any relationship between

		them and defendants. With regard to the remaining state-law claims, we decline to exercise supplemental jurisdiction and We recognize that it might be unexpected that we are dismissing a substantial portion of plaintiffs claims, given that several of the defendants here have already paid penalties to government regulatory agencies reaching into the billions of dollars. However, these results are not as incongruous as they might seem. Under the statutes invoked here, there are many requirements that private plaintiffs must satisfy, but which government agencies need not. The reason for these differing requirements is that the focuses of public enforcement and private enforcement, even of the same statutes, are not identical. The broad public interests behind the statutes invoked here, such as integrity of the markets and competition, are being addressed by ongoing governmental enforcement. While public enforcement is often supplemented by suits brought by private parties acting as "private attorneys general," those private actions which seek damages and attorneys fees must be examined closely to ensure that the plaintiffs who are suing are the ones properly entitled to recover and that

		the suit is, in fact, serving the public purposes of the laws being invoked. Therefore, although we are fully cognizant of the settlements that several of the defendants here have entered into with government regulators, we find that only some of the claims that plaintiffs have asserted may properly proceed. (Signed by Judge Naomi Reice Buchwald on 3/29/2013) (tro) Modified on 4/3/2013 (tro). (Entered: 04/02/2013)
09/17/2013	49	FILING ERROR - DEFICIENT DOCKET ENTRY - NOTICE OF APPEAL from 43 Order on Motion to Dismiss, 47 Order. Document filed by Ellen Gelboim, Linda Zacher. Filing fee $ 455.00, receipt number 0208-8877902. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. (Weinstein, David) Modified on 9/17/2013 (nd). (Entered: 09/17/2013)
09/17/2013		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 49 Notice of Appeal. (tp) (Entered: 09/17/2013)
09/17/2013		Appeal Record Sent to USCA (Electronic File). [LIST OF RECORD DOCUMENTS OMITTED]

09/17/2013	50	NOTICE OF APPEAL from (389 in 1:11-md-02262-NRB, 389 in 1:11-md-02262- NRB, [docket and case number repeated multiple times] Order on Motion for Reconsideration, Order on Motion for Leave to File Document,, Order on Motion to Amend/Correct, (43 in 1:12-cv-01025-NRB, 43 in 1:12-cv-01025-NRB) Order on Motion to Dismiss, (286 in 1:11-md-02262-NRB, 286 in 1:11-md-02262-NRB, [docket and case umber repeated multiple times] Order on Motion to Dismiss, (199 in 1:11-md-02262- NRB) Endorsed Letter, (47 in 1:12-cv-01025-NRB) Order. Document filed by Ellen Gelboim, Linda Zacher. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. Filed In Associated Cases: 1:11-md-02262-NRB, 1:12-cv-01025-NRB(Weinstein, David) (Entered: 09/17/2013)
09/17/2013		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: (409 in 1:11-md-02262-NRB, 50 in 1:12-cv-01025-NRB) Notice of Appeal. Filed In Associated Cases: 1:11-md-02262-NRB, 1:12-cv-01025-NRB(nd) (Entered: 09/17/2013)
09/18/2013	51	LETTER MOTION for Conference addressed to Judge Naomi Reice

		Buchwald from William Christopher Carmody dated September 18, 2013. Document filed by Mayor and City Council of Baltimore.Filed In Associated Cases: 1:11-md-02262-NRB et al. (Ard, Seth) (Entered: 09/18/2013)
09/30/2013	52	LETTER addressed to Judge Naomi Reice Buchwald from William Christopher Carmody dated September 30, 2013 re: repleading antitrust claim. Document filed by Mayor and City Council of Baltimore. (Attachments: # 1 Exhibit A)Filed In Associated Cases: 1:11-md-02262-NRB et al. (Ard, Seth) (Entered: 09/30/2013)
10/10/2013	57	LETTER addressed to Judge Naomi Reice Buchwald from William Christopher Carmody dated October 10, 2013 re: Partial Stay and Motion to Dismiss. Document filed by Mayor and City Council of Baltimore. (Attachments: # 1 Exhibit A)Filed In Associated Cases: 1:11-md-02262-NRB et al. (Carmody, William) (Entered: 10/10/2013)
10/18/2013	67	MEMORANDUM AND ORDER: Pursuant to Fed. R. Civ. P. 54(b), final judgment is entered dismissing the first count of the over-the counter plaintiffs' consolidated amended complaint (Dkt. No. 130) for violation

		of section 1 of the Sherman Act, and denying leave to replead that claim in a proposed amended complaint (dkt. No. 334-1), for the reasons given in the March 29, 2013 and August 23, 2013 orders of this Court, and it is further ORDERED, pursuant to Fed. R. Civ. P. 54(b), final judgment is entered dismissing the fourth count of the exchange based plaintiffs' amended consolidated class action complaint (Dkt. No. 134) for violation of section 1 of the Sherman Act, and denying leave to replead that claim in a proposed amended complaint (Dkt. No. 332-1), for the reasons given in the March 29, 2013 and August 23, 2013 orders of this Court. (Signed by Judge Naomi Reice Buchwald on 10/17/2013) Filed In Associated Cases: 1:11-md-02262-NRB et al. (ft) (Entered: 10/30/2013)
10/18/2013		Transmission to Judgments and Orders Clerk. Transmitted re: (69 in 1:13-cv-07005- NRB, 43 in 1:12-cv-07461-NRB, 54 in 1:12-cv-05723-NRB, 97 in 1:13-cv-02297- NRB, 7 in 1:13-cv-07394-NRB, 44 in 1:13-cv-03952-NRB, 45 in 1:13-cv-00597-NRB, 34 in 1:13-cv-01016-NRB, 54 in 1:13-cv-00407-NRB, 35 in 1:13-cv-01456- NRB, 62 in 1:12-cv-05822-NRB, 490 in 1:11-md-02262-NRB, 55 in 1:12-cv-06056- NRB, 44 in 1:13-cv-

		00625-NRB, 56 in 1:13-cv-01198-NRB, 49 in 1:13-cv-02343- NRB, 45 in 1:13-cv-03010-NRB, 55 in 1:13-cv-00598-NRB, 26 in 1:13-cv-06020-NRB, 44 in 1:13-cv-00667-NRB, 59 in 1:13-cv-01135-NRB, 24 in 1:13-cv-05616- NRB, 26 in 1:13-cv-06014-NRB, 34 in 1:13-cv-05511-NRB, 43 in 1:13-cv-00627- NRB, 26 in 1:13-cv-05569-NRB, 26 in 1:13-cv-05221-NRB, 52 in 1:13-cv-00346- NRB, 67 in 1:12-cv-01025-NRB, 63 in 1:13-cv-00398-NRB, 26 in 1:13-cv-06013-NRB, 33 in 1:13-cv-05187-NRB, 42 in 1:12-cv-06693-NRB, 43 in 1:13-cv-00626-NRB, 31 in 1:13-cv-05186-NRB) Order to the Judgments and Orders Clerk. Filed In Associated Cases: 1:11-md-02262-NRB et al. (ft) (Entered: 10/30/2013)
10/31/2013	68	Withdrawn pursuant to Order filed 10/31/13, Doc. #492, 11 MD 2262 – RULE 54(b) CLERK'S JUDGMENT That for the reasons stated in the Court's Memorandum and Order dated October 17, 2013, there is no just reason for delay, pursuant to Fed. R. Civ. P. 54(b), final judgment is entered dismissing the first count of the over-the-counter plaintiffs' consolidated amended complaint for violation of section 1 of the Sherman Act, and denying leave to replead that claim in a proposed amended

		complaint for the reasons given in the March 29, 2013 and August 23, 2013 orders of this Court, and there is no just reason for delay, pursuant to Fed. R. Civ. P. 54(b), final judgment is entered dismissing the fourth count of the exchange based plaintiffs' amended consolidated class action complaint for violation of section 1 of the Sherman Act, and denying leave to replead that claim in a proposed amended complaint for the reasons given in the March 29, 2013 and August 23, 2013 orders of this Court. (Signed by Clerk of Court Ruby Krajick on 10/31/13) (Attachments: # 1 Notice of Right to Appeal)Filed In Associated Cases: 1:11-md-02262-NRB et al. (ml) Modified on 10/31/2013 (ml). Modified on 11/4/2013 (ml). (Entered: 10/31/2013)
10/31/2013	69	ORDER: WHEREAS, on October 30, 2013 the Court of Appeals, acting sua sponte determined that it lacked jurisdiction over the bondholder and Schwab appeals and dismissed them, it is hereby ORDERED that the October 17, 2013 is withdrawn. (Signed by Judge Naomi Reice Buchwald on 10/31/2013) Filed In Associated Cases: 1:11-md- 02262-NRB et al. (ama) (Entered: 10/31/2013)

		denying (453) Motion to Dismiss; granting in part and denying in part (507) Motion to Dismiss; granting (516) Motion to Dismiss in case 1:11-md-02262-NRB. For the reasons stated above, exchange-based plaintiffs' motion for reconsideration of our ruling on trader-based claims is denied, but their motion for leave to amend their complaint is granted; defendants' motion to dismiss CEA claims on scienter grounds is denied; defendants' motion to dismiss CEA claims arising out of contracts purchased between May 30, 2008 and April 14, 2009 is granted; defendants' motion to dismiss OTC plaintiffs' contract and unjust enrichment claims is granted in part and denied in part; and defendant Societe Generale's motion to dismiss the exchange-based plaintiffs' complaint is granted. It has been nearly two years since defendants first moved to dismiss plaintiffs' consolidated amended complaints. Since then, this Court has issued three major opinions and the parties have submitted hundreds, if not thousands, of pages of briefing materials, all in an attempt to resolve the threshold question of any litigation: what claims, if any, have plaintiffs adequately pled? Now, at long last,

		there is clarity. OTC plaintiffs may state claims for breach of the implied covenant of good faith and fair dealing, and claims for unjust enrichment, but only against those defendant banks with which OTC plaintiffs transacted directly. Exchange-based plaintiffs may state claims under the CEA based on contracts purchased between April 15, 2009 and the end of the Class Period, based on a theory that defendants' alleged persistent suppression of LIBOR caused them damages; however, no such claim may lie against Societe Generale, as those claims are time barred. Exchange-based plaintiffs may also state claims against Barclays and Rabobank based on the alleged day-to-day, trader-based manipulation that occurred between January 1, 2005 and August 2007. This Memorandum and Order resolves docket entry nos. 396, 418, 428, 453, 507, and 516. (Signed by Judge Naomi Reice Buchwald on 6/23/2014) Filed In Associated Cases: 1:11-md-02262-NRB et al. ***Docketed in all member and related cases pursuant to instructions from Chambers. (mro) Modified on 6/24/2014 (mro). (Entered: 06/23/2014)

07/02/2014	78	NOTICE: Within the next ten days, the Court will issue a communication addressing issues related to the next steps in this litigation and inviting submissions from the parties. Before receiving our communication, counsel are directed not to make any submissions to the Court. (Signed by Judge Naomi Reice Buchwald on 7/2/2014) Filed In Associated Cases: 1:11-md-02262-NRB et al. ***Docketed in all member and related cases pursuant to instructions from Chambers. (mro) (Entered: 07/03/2014)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CASE #: 1:11-md-02262-NRB

In Re: Libor-Based Financial Instruments Antitrust Litigation

Relevant Docket Entries (MDL Docket)

Date	#	Docket Text
08/12/2011	1	CERTIFIED TRUE COPY OF CONDITIONAL MDL TRANSFER IN ORDER FROM THE MDL PANEL . . . transferring this action from the United States District Court - that pursuant to 28 U.S.C. 1407, the actions listed on the attached schedule A and pending in the Districts of New York, Illinois, and the same hereby are, transferred to the Southern District of New York, with the consent of that court, assigned to the Honorable Judge Naomi Reice Buchwald, for coordinated or consolidated pretrial proceedings with the actions pending in that district and listed on Schedule A. (Signed by MDL Panel on 8/12/11) (rjm) (Entered:

		08/15/2011)
08/12/2011		CASES ORIGINATING FROM THE SOUTHERN DISTRICT OF NEW YORK: 1:11-cv-2613 (NRB), 1:11-cv-2883 (NRB), 1:11-cv-3128 (NRB), 1:11-cv-3249 (NRB). (rjm) (Entered: 08/15/2011)
11/29/2011	66	ORDER: For the foregoing reasons, we hereby order: (1) that the LIBOR-related class action complaints currently pending before this Court be consolidated for all purposes under Federal Rule of Civil Procedure 42(a), under the following caption: In Re: Libor- Based Financial Instruments Antitrust Litigation, Master File No. 1:11-md-02262-NRB; (2) that the law firms of Hausfeld LLP and Susman and Godfrey LLP are appointed to serve as interim class counsel for the putative class of over-the-counter plaintiffs; (3) that the law firms of Kirby McInerney LLP and Lovell Stewart Halebian Jacobson LLP are appointed to serve as interim class counsel for the putative class of exchange-based plaintiffs; and (4) within 20 days, interim class counsel shall submit to this Court a proposed order to facilitate their

		representation of the putative classes and to advance the conduct and progress of the litigation. (Signed by Judge Naomi Reice Buchwald on 11/29/2011) Filed In Associated Cases: 1:11-md-02262-NRB et al. Copies Mailed By Chambers. (ae) (Entered: 11/30/2011)
12/22/2011	90	PRE-TRIAL ORDER NO. 1: Mayor and City Council of Baltimore v. Bank of America, et al., Case No. 11.Civ. 5450, is designated as the lead action for the Over- the-Counter Plaintiff class actions("Over-the-Counter Plaintiff Action"), as further listed in this Pretrial Order. All filings related to the Over-the-Counter Plaintiff Action must be filed in that docket and in the docket for In re LIBOR-based Financial Instruments Antitrust Litigation, MDL No. 2262. Upon their transfer to the docket for Mayor and City Council of Baltimore v. Bank of America, et al., the Clerk will close the docket for those additional cases. Pursuant to Fed. R. Civ. P. 23(g)(3), the Court designates as Interim Co-Lead Counsel for the Over-the-Counter Plaintiff class,

		Hausfeld LLP, and Susman Godfrey L.L.P. FTC Capital GmbH, et al. v. Credit Suisse Group AG, et al., Case No. 11 Civ. 2613 is designated as the lead action for the Exchange-Based Plaintiff actions ("Exchange-Based Plaintiff Action"), as further listed in this Pretrial Order. All filings related to the Exchange-Based Plaintiff Action must be filed in that docket and in the docket for In re LIBOR-based Financial Instruments Antitrust Litigation, MDL No. 2262. Upon their transfer to the docket for FTC Capital GmbH, et al. v. Credit Suisse Group AG, et al., the Clerk will close the docket for those additional cases. Pursuant to Fed. R. Civ. P. 23(g)(3), the Court designates as Interim Co-Lead Counsel for the Exchange-Based Plaintiff class, Kirby Mcinerney LLP, and Lovell Stewart Halebian Jacobson LLP. (Signed by Judge Naomi Reice Buchwald on 12/22/2011) (tro) (Entered: 12/23/2011)
03/01/2012		Minute Entry for proceedings held before Judge Naomi Reice Buchwald: Status Conference

		held on 3/1/2012. (lmb) (Entered: 03/06/2012)
03/12/2012	117	TRANSCRIPT of Proceedings re: Conference held on 3/1/2012 before Judge Naomi Reice Buchwald. Court Reporter/Transcriber: Toni Stanley, (212) 805-0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 4/5/2012. Redacted Transcript Deadline set for 4/16/2012. Release of Transcript Restriction set for 6/14/2012. Filed In Associated Cases: 1:11-md-02262-NRB et al. (McGuirk, Kelly) (Entered: 03/12/2012)
04/30/2012	130	CONSOLIDATED AMENDED COMPLAINT against Bank of Tokyo-Mitsubishi UFJ Ltd, Barclays Bank Plc,, Citibank NA, Credit Suisse Group AG, Deutsche Bank AG, HBOS PLC, HSBC Holdings plc., J.P. Morgan Chase & Co., Lloyds Banking Group plc, Royal Bank of Canada, Royal Bank of Scotland Group

		plc, The Norinchukin Bank, WestLB AG, Bank of America, N.A., National Association, HSBC Bank PLC, WestDeutsche Immobilienbank AG, Citigroup Inc, Cooperative Centrale Raiffeisen-Boerenleenbank B.A. with JURY DEMAND. Document filed by Mayor and City Council of Baltimore, City of New Britain Firefighters' and Police Benefit Fund. (cd) (ama). (Entered: 05/01/2012)
04/30/2012	131	FIRST AMENDED COMPLAINT against [defendants identified in Gelboim docket entry 1] with JURY DEMAND.Document filed by Ellen Gelboim, Linda Zacher.***Also docketed in case number 12-cv-1025. (mro) (ama). (ama). (Entered: 05/01/2012)
04/30/2012	134	CONSOLIDATED AMENDED COMPLAINT against Bank of America Corporation, Bank of America, N.A., Bank of Tokyo-Mitsubishi UFJ Ltd, Barclays Bank Plc,, Citibank NA, Citigroup Inc, Cooperative Centrale Raiffeisen-Boerenleenbank B.A., Credit Suisse Group AG, Deutsche Bank AG, HBOS PLC, HSBC Bank PLC, HSBC Holdings plc., J.P.

		Morgan Chase & Co., JPMorgan Chase Bank, National Association, Lloyds Banking Group plc, Royal Bank of Canada, Royal Bank of Scotland Group plc, The Norinchukin Bank, WestDeutsche Immobilienbank AG, WestLB AG with JURY DEMAND.Document filed by Metzler Investment GmbH, FTC Futures Fund SICAV, FTC Futures Fund PCC Ltd, Atlantic Trading USA, LLC, 303030 Trading LLC, Gary Francis, Nathaniel Haynes. (mro) (Additional attachment(s) added on 5/16/2012: # 1 Amended Cons. Comp. Part 2, # 2 Amended Cons. Comp. Part 3) (ama). Modified on 8/28/2012 (mro). (Entered: 05/03/2012)
04/30/2012	146	AMENDED COMPLAINT against [defendants identified in Gelboim docket entry 1] with JURY DEMAND. Document filed by Schwab Total Bond Market Fund, Schwab Short-Term Bond Market Fund, Schwab U.S. Dollar Liquid Assets Fund. (also docketed in 11 cv 6409)(cd) (Entered: 05/18/2012)

04/30/2012	147	AMENDED COMPLAINT against [defendants identified in Gelboim docket entry 1] with JURY DEMAND.Document filed by Schwab Advisor Cash Reserves, Schwab Investor Money Fund, Schwab Cash Reserves, Schwab Value Advantage Money Fund, Schwab Yieldplus Fund Liquidation Trust, Schwab Retirement Advantage Money Fund, Schwab Money Market Fund, Schwab Yieldplus Fund. (Also docketed in 11 cv 6412)(ft) (ft). (Entered: 05/18/2012)
04/30/2012	148	AMENDED COMPLAINT against [defendants identified in Gelboim docket entry 1] with JURY DEMAND. Document filed by The Charles Schwab Corporation, Charles Schwab Bank, N.A., Charles Schwab & Co., Inc. (Received in the night deposit box on 4/30/2012 at 11:40 pm) ***Also docketed in case number 11-cv-6411. (mro) Modified on 5/18/2012 (mro). (mro). (Entered: 05/18/2012)
06/14/2012	151	ORDER: WHEREAS on June 14, 2012 1 the Court issued an order requiring any plaintiff wishing to be joined with the multi-district litigation ("MDL") as a

		representative of a new class of plaintiffs to make an application detailing why the existing classes of plaintiffs do not protect it and why inclusion in the MDL would be appropriate; and WHEREAS it is the intent of the Court that the order of June 14, 2012 apply to plaintiff in 12 cv 4205,ORDERED that plaintiff in that action submit it's application within ten (10) days of this Order. (Signed by Judge Naomi Reice Buchwald on 6/14/2012) Copies Mailed By Chambers. (ama) Modified on 6/14/2012 (ama). (Entered: 06/14/2012)
06/14/2012	152	MEMORANDUM AND ORDER: Therefore, any plaintiff seeking to be joined as a representative of a separate class must file with its pleadings an application detailing why the existing classes of plaintiffs do not protect it and why inclusion in the MDL would be appropriate. SO ORDERED. (Signed by Judge Naomi Reice Buchwald on 6/14/2012) (ama) (Entered: 06/14/2012)
06/29/2012	165	MOTION to Dismiss the Amended Complaints. Document filed by Bank of America Corporation, Bank of Tokyo-

		Mitsubishi UFJ Ltd, Citibank NA, Credit Suisse Group AG, Deutsche Bank AG, HSBC Holdings plc., J.P. Morgan Chase & Co., Lloyds Banking Group plc, Royal Bank of Canada, Royal Bank of Scotland Group plc, The Norinchukin Bank, WestLB AG, Bank of America Corporation, Bank of Tokyo- Mitsubishi UFJ, Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A., HSBC Bank PLC, J.P. Morgan Chase & Co., JPMorgan Chase Bank, National Association, Bank of America Corporation, Deutsche Bank AG, HBOS PLC, HSBC Holdings plc, J.P. Morgan Chase & Co., Royal Bank of Scotland Group plc, Bank of America Corporation, Bank of America, N.A., Citigroup Inc, Bank of America Corporation, Bank of America, N.A., Citibank, N.A., Citigroup, Inc., J.P. Morgan Chase & Co., JPMorgan Chase Bank National Association, Royal Bank of Scotland Group plc, CitiGroup Inc., Citibank, N.A., Cooperatieve Centrale Raiffeisen-Boerenleen Bank B.A., JP Morgan Chase & Co., JPMorgan Chase Bank, N.A., Royal Bank of Canada. Filed In Associated

		Cases: 1:11-md-02262-NRB et al. (Wise, Robert) (Entered: 06/29/2012)
06/29/2012	166	MEMORANDUM OF LAW in Support re: (112 in 1:11-cv-06411-NRB, 25 in 1:12- cv-01025-NRB, 165 in 1:11-md-02262-NRB, 108 in 1:11-cv-06409-NRB, 89 in 1:11-cv-02613-NRB, 118 in 1:11-cv-06412-NRB, 51 in 1:11-cv-05450-NRB) MOTION to Dismiss the Amended Complaints. Document filed by [defendants identified in docket entry 165]. Filed In Associated Cases: 1:11-md-02262-NRB et al. (Wise, Robert) (Entered: 06/29/2012)
06/29/2012	167	DECLARATION of Robert F. Wise, Jr. in Support re: (165 in 1:11-md-02262-NRB, 89 in 1:11-cv-02613-NRB, 118 in 1:11-cv-06412-NRB, 51 in 1:11-cv-05450-NRB, 112 in 1:11-cv-06411-NRB, 25 in 1:12-cv-01025-NRB, 108 in 1:11-cv-06409-NRB) MOTION to Dismiss the Amended Complaints.. Document filed by [defendants identified in docket entry 165]. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)Filed In Associated Cases: 1:11-md-02262-NRB et al. (Wise, Robert)

		(Entered: 06/29/2012)
6/29/2012	168	MEMORANDUM OF LAW in Support re: (165 in 1:11-md-02262-NRB, 89 in 1:11-cv-02613-NRB) MOTION to Dismiss *the Amended Complaints. of the Exchange- Based Plaintiffs' Claims with Attached Exhibit 1.* Document filed by Bank of America Corporation, Bank of Tokyo-Mitsubishi UFJ Ltd, Citibank NA, Credit Suisse Group AG, Deutsche Bank AG, HSBC Holdings plc., J.P. Morgan Chase & Co., Lloyds Banking Group plc, Royal Bank of Canada, Royal Bank of Scotland Group plc, The Norinchukin Bank, WestLB AG, Bank of America Corporation, Bank of America, N.A., Citigroup Inc, Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A., Deutsche Bank AG, HBOS PLC, HSBC Bank PLC, J.P. Morgan Chase & Co., JPMorgan Chase Bank, National Association, Royal Bank of Scotland Group plc. (Attachments: # 1 Exhibit 1) Filed In Associated Cases: 1:11-md-02262-NRB, 1:11-cv-02613-NRB (Wise, Robert) (Entered: 06/29/2012)

06/29/2012	169	MEMORANDUM OF LAW in Support re: (112 in 1:11-cv-06411-NRB, 165 in 1:11-md-02262-NRB, 108 in 1:11-cv-06409-NRB, 118 in 1:11-cv-06412-NRB) MOTION to Dismiss *the Amended Complaints of the Schwab Plaintiffs' Amended Complaints*. Document filed by [defendants identified in docket entry 165]. Filed In Associated Cases: 1:11-md-02262-NRB, 1:11-cv-06409-NRB, 1:11-cv-06411-NRB, 1:11-cv-06412-NRB (Wise, Robert) (Entered: 06/29/2012)
06/29/2012	171	SUPPLEMENTAL MEMORANDUM OF LAW in Support re: 165 MOTION to Dismiss *the Amended Complaints*.. Document filed by The Norinchukin Bank. (Stern, Andrew) (Entered: 06/29/2012)
06/29/2012	173	SUPPLEMENTAL MEMORANDUM OF LAW in Support re: (112 in 1:11-cv-06411-NRB, 25 in 1:12-cv-01025-NRB, 165 in 1:11-md-02262-NRB, 108 in 1:11-cv-06409-NRB, 89 in 1:11-cv-02613-NRB, 118 in 1:11-cv-06412-NRB, 51 in 1:11-cv-05450-NRB) MOTION to Dismiss *the Amended Complaints*.. Document filed by Bank of Tokyo-

		Mitsubishi UFJ Ltd. Filed In Associated Cases: 1:11-md-02262-NRB et al. (Libow, Daryl) (Entered: 06/29/2012)
06/29/2012	174	DECLARATION of Christopher M. Viapiano in Support re: (112 in 1:11-cv-06411- NRB, 25 in 1:12-cv-01025-NRB, 165 in 1:11-md-02262-NRB, 108 in 1:11-cv-06409-NRB, 89 in 1:11-cv-02613-NRB, 118 in 1:11-cv-06412-NRB, 51 in 1:11-cv-05450-NRB) MOTION to Dismiss *the Amended Complaints*.. Document filed by Bank of Tokyo-Mitsubishi UFJ Ltd. (Attachments: # 1 Exhibit No. 1, # 2 Exhibit No. 2)Filed In Associated Cases: 1:11-md-02262-NRB et al. (Libow, Daryl) (Entered: 06/29/2012)
06/29/2012	175	SUPPLEMENTAL MEMORANDUM OF LAW in Support re: 165 MOTION to Dismiss *the Amended Complaints*.. Document filed by Credit Suisse Group AG. (Washer, Herbert) (Entered: 06/29/2012)
06/29/2012	176	MOTION to Dismiss. Document filed by Barclays Bank Plc. (Scott, Jeffrey) (Entered: 06/29/2012)

06/29/2012	177	MEMORANDUM OF LAW in Support re: 176 MOTION to Dismiss.. Document filed by Barclays Bank Plc. (Scott, Jeffrey) (Entered: 06/29/2012)
06/30/2012	178	MOTION to Dismiss. Document filed by UBS AG, UBS AG.Filed In Associated Cases: 1:11-md-02262-NRB et al. (Sullivan, Peter) (Entered: 06/30/2012)
06/30/2012	179	MEMORANDUM OF LAW in Support re: (58 in 1:11-cv-05450-NRB, 127 in 1:11- cv-06412-NRB, 117 in 1:11-cv-06409-NRB, 32 in 1:12-cv-01025-NRB, 18 in 1:11-cv-07676-NRB, 178 in 1:11-md-02262-NRB, 121 in 1:11-cv-06411-NRB) MOTION to Dismiss.. Document filed by UBS AG, UBS AG. Filed In Associated Cases: 1:11-md-02262-NRB et al. (Sullivan, Peter) (Entered: 06/30/2012)
06/30/2012	180	DECLARATION of Lawrence J. Zweifach in Support re: (32 in 1:12-cv-01025-NRB, 18 in 1:11-cv-07676-NRB, 178 in 1:11-md-02262-NRB, 121 in 1:11-cv-06411-NRB, 58 in 1:11-cv-05450-NRB, 127 in 1:11-cv-06412-NRB, 117 in 1:11-cv-06409-NRB) MOTION to Dismiss.. Document filed by UBS AG, UBS AG. (Attachments: # 1

		Exhibit 1, # 2 Exhibit 2, # 3 Exhibit 3, # 4 Exhibit 4, # 5 Exhibit 5) Filed In Associated Cases: 1:11-md-02262-NRB et al. (Zweifach, Lawrence) (Entered: 06/30/2012)
07/18/2012	187	MEMORANDUM AND ORDER: Accordingly, we reverse our previous consolidation order pursuant to Rule 42(a) and instead consolidate the class action complaints pending in the MDL for pretrial purposes only. (Signed by Judge Naomi Reice Buchwald on 7/18/2012) Filed In Associated Cases: 1:11-md-02262-NRB et al. (lmb) (Entered: 07/18/2012)
08/10/2012	197	FILING ERROR - DEFICIENT DOCKET ENTRY - MOTION to Appoint Counsel - *Motion for Entry of Pre-Trial Order No. 2.* Document filed by Ellen Gelboim, Linda Zacher. (Attachments: # 1 Text of Proposed Order Exhibit A, # 2 Exhibit B - Declaration of Karen L. Morris, # 3 Exhibit C - Declaration of David H. Weinstein) (Spiegel, Jeremy) Modified on 8/13/2012 (ldi). (Entered: 08/10/2012)
08/10/2012	199	ENDORSED LETTER addressed to Judge Naomi Reice Buchwald

		from Michael D. Hausfeld, William C. Carmody, David H. Weinstein, Karen L. Morris, David Kovel, Christopher Lovell, Steven E. Fineman dated 8/1/2012 re: Request that the Court hold a pre-motion conference to address Plaintiffs' intention to move for leave to amend their complaints in light of material new facts regarding Defendants' alleged manipulation of the London Inter Bank Offered Rate ("LIBOR")-principally relating to U.S.-Dollar LIBOR-that have surfaced throughout the past month and continue to emerge. In connection with their anticipated motion(s) for leave to amend, Plaintiffs will also request that the Court vacate the existing briefing schedule to Defendants' motions to dismiss filed on June 29, 2012, to which Plaintiffs currently must respond by August 28, 2012. As detailed below, granting Plaintiffs' requests would promote the mutual interest of the Court and all parties to efficiently manage this litigation. ENDORSEMENT: Application denied for the reasons stated on the record on August 8, 2012. See transcript. So

		ordered. (Signed by Judge Naomi Reice Buchwald on 8/9/2012) (rjm) Modified on 8/14/2012 (tro). (Entered: 08/10/2012)
08/13/2012	201	MOTION to Appoint Counsel - *Motion for Entry of Pre-Trial Order No. 2*. Document filed by Ellen Gelboim, Linda Zacher. (Attachments: # 1 Text of Proposed Order Exhibit A) (Spiegel, Jeremy) (Entered: 08/13/2012)
08/13/2012	202	DECLARATION of Karen L. Morris in Support re: 201 MOTION to Appoint Counsel - *Motion for Entry of Pre-Trial Order No. 2*. Document filed by Ellen Gelboim, Linda Zacher. (Attachments: # 1 Exhibit 1 - Morris and Morris LLC Firm Summary) (Spiegel, Jeremy) (Entered: 08/13/2012)
08/13/2012	203	DECLARATION of David H. Weinstein in Support re: 201 MOTION to Appoint Counsel - *Motion for Entry of Pre-Trial Order No. 2*. Document filed by Ellen Gelboim, Linda Zacher. (Attachments: # 1 Exhibit 1 - Weinstein Kitchenoff & Asher LLC Firm Summary) (Spiegel, Jeremy) (Entered: 08/13/2012)

08/14/2012	205	MEMORANDUM AND ORDER: For the reasons stated at our August 8, 2012 conference, a stay is hereby imposed on any actions not subject to defendants' pending motion to dismiss, filed on June 29, 2012. The stay applies to the four actions already filed that are not subject to the motion, as well as any new actions filed hereafter that fall within the scope of the multi-district litigation. The stay will remain in place until the pending motion to dismiss is resolved. (Signed by Judge Naomi Reice Buchwald on 8/14/2012) Filed In Associated Cases: 1:11-md-02262-NRB, 1:12-cv-05723-NRB, 1:12-cv-05822-NRB, 1:12-cv-06056-NRB (djc) (Entered: 08/14/2012)
08/14/2012	206	PRETRIAL ORDER NO. 2: Consolidation and Coordination of Bondholder Plaintiff Actions I. Ellen Gelboim and Linda Zacher v. Credit Suisse Group AG, et al, Case No. 12 CV 1025 (NRB), is designated as the lead action for all class actions brought on behalf of holders of LIB OR-based debt securities not issued by any Defendant ("Bondholder Plaintiff Action") that may hereafter be filed in or transferred to the

		Court as related to In re LiBOR-Based Financial Instruments Antitrust Litigation, MDL No. 2262. (Signed by Judge Naomi Reice Buchwald on 8/14/2012) (djc) (Entered: 08/14/2012)
08/28/2012	207	FILING ERROR - DEFICIENT DOCKET ENTRY - MEMORANDUM OF LAW in Opposition re: (165 in 1:11-md-02262-NRB) MOTION to Dismiss *the Amended Complaints.*, (176 in 1:11-md-02262-NRB) MOTION to Dismiss, (178 in 1:11-md-02262-NRB) MOTION to Dismiss. *Plaintiffs' Joint Memorandum of Law in Opposition to Defendants' Motion to Dismiss Plaintiffs' Antitrust Claims.* Document filed by Charles Schwab & Co., Inc., Charles Schwab Bank, N.A., City of New Britain Firefighters' and Police Benefit Fund, FTC Capital GMBH, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Ellen Gelboim, Mayor and City Council of Baltimore, Metzler Investment GmbH, Schwab Advisor Cash Reserves, Schwab Cash Reserves, Schwab Investor Money Fund, Schwab Money Market Fund, Schwab Retirement Advantage Money Fund, Schwab Short-Term Bond

		Market Fund, Schwab Total Bond Market Fund, Schwab U.S. Dollar Liquid Assets Fund, Schwab Value Advantage Money Fund, Schwab Yieldplus Fund, Schwab Yieldplus Fund Liquidation Trust, The Charles Schwab Corporation. (Attachments: # 1 Affidavit Declaration of Hilary K. Scherrer, # 2 Exhibit Exhibits 1-4, # 3 Exhibit Exhibit 5, # 4 Exhibit Exhibits 6-7) Filed In Associated Cases: 1:11-md-02262-NRB, 1:12-cv-05723-NRB, 1:12-cv- 05822-NRB, 1:12-cv-06056-NRB(Ratway, Hilary) Modified on 8/29/2012 (ldi). (Entered: 08/28/2012)
08/28/2012	208	MEMORANDUM OF LAW in Opposition re: 165 MOTION to Dismiss *the Amended Complaints*., 176 MOTION to Dismiss., 178 MOTION to Dismiss. *Opposition of Exchange-Based Plaintiffs*. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Kovel, David) (Entered: 08/28/2012)
08/28/2012	209	DECLARATION of David E.

		Kovel in Opposition re: 165 MOTION to Dismiss *the Amended Complaints.*, 176 MOTION to Dismiss., 178 MOTION to Dismiss.. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Attachments: # 1 Exhibit, # 2 Exhibit, # 3 Exhibit, # 4 Exhibit, # 5 Exhibit, # 6 Exhibit, # 7 Exhibit, # 8 Exhibit, # 9 Exhibit, # 10 Exhibit) (Kovel, David) (Entered: 08/28/2012)
08/28/2012	210	MEMORANDUM OF LAW in Opposition re: 165 MOTION to Dismiss *the Amended Complaints.*, 176 MOTION to Dismiss., 178 MOTION to Dismiss.. Document filed by [Schwab entities]. (Fineman, Steven) (Entered: 08/28/2012)
08/29/2012	211	MEMORANDUM OF LAW in Opposition re: (165 in 1:11-md-02262-NRB) MOTION to Dismiss *the Amended Complaints.*, (176 in 1:11-md-02262-NRB) MOTION to Dismiss., (178 in 1:11-md-02262-NRB) MOTION to Dismiss. *Plaintiffs' Joint Memorandum of*

		Law in Opposition to Defendants' Motion to Dismiss Plaintiffs' Antitrust Claims. Document filed by Charles Schwab & Co., Inc., Charles Schwab Bank, N.A., City of New Britain Firefighters' and Police Benefit Fund, FTC Capital GMBH, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Ellen Gelboim, Mayor and City Council of Baltimore, Metzler Investment GmbH, Schwab Advisor Cash Reserves, Schwab Cash Reserves, Schwab Investor Money Fund, Schwab Money Market Fund, Schwab Retirement Advantage Money Fund, Schwab Short-Term Bond Market Fund, Schwab Total Bond Market Fund, Schwab U.S. Dollar Liquid Assets Fund, Schwab Value Advantage Money Fund, Schwab Yieldplus Fund, Schwab Yieldplus Fund Liquidation Trust, The Charles Schwab Corporation, Linda Zacher. Filed In Associated Cases: 1:11-md-02262-NRB, 1:12-cv-05723- NRB, 1:12-cv-05822-NRB, 1:12-cv-06056-NRB (Ratway, Hilary) (Entered: 08/29/2012)
08/29/2012	212	DECLARATION of Hilary K. Scherrer in Opposition re: (165 in 1:11-md-02262- NRB) MOTION

		to Dismiss *the Amended Complaints*., (176 in 1:11-md-02262- NRB) MOTION to Dismiss., (178 in 1:11-md-02262-NRB) MOTION to Dismiss.. Document filed by Charles Schwab & Co., Inc., Charles Schwab Bank, N.A., City of New Britain Firefighters' and Police Benefit Fund, FTC Capital GMBH, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Ellen Gelboim, Mayor and City Council of Baltimore, Metzler Investment GmbH, Schwab Advisor Cash Reserves, Schwab Cash Reserves, Schwab Investor Money Fund, Schwab Money Market Fund, Schwab Retirement Advantage Money Fund, Schwab Short-Term Bond Market Fund, Schwab Total Bond Market Fund, Schwab U.S. Dollar Liquid Assets Fund, Schwab Value Advantage Money Fund, Schwab Yieldplus Fund, Schwab Yieldplus Fund Liquidation Trust, The Charles Schwab Corporation, Linda Zacher. (Attachments: # 1 Exhibit 1-4, # 2 Exhibit 5, # 3 Exhibit 6-7)Filed In Associated Cases: 1:11-md-02262-NRB, 1:12- cv-05723-NRB, 1:12-cv-05822-NRB, 1:12-cv-06056-

		NRB (Ratway, Hilary) (Entered: 08/29/2012)
08/29/2012	214	TRANSCRIPT of Proceedings re: CONFERENCE held on 8/8/2012 before Judge Naomi Reice Buchwald. Court Reporter/Transcriber: Vincent Bologna, (212) 805- 0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 9/24/2012. Redacted Transcript Deadline set for 10/4/2012. Release of Transcript Restriction set for 11/30/2012.Filed In Associated Cases: 1:11-md-02262-NRB, 1:12-cv-05723- NRB, 1:12-cv-05822-NRB, 1:12-cv-06056-NRB (McGuirk, Kelly) (Entered: 08/29/2012)
08/29/2012	215	NOTICE OF FILING OF OFFICIAL TRANSCRIPT Notice is hereby given that an official transcript of a CONFERNCE proceeding held on 8/8/12 has been filed by the court reporter/transcriber in the above-captioned matter. The parties

		have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days...Filed In Associated Cases: 1:11-md-02262-NRB, 1:12-cv-05723-NRB, 1:12-cv-05822-NRB, 1:12-cv-06056-NRB(McGuirk, Kelly) (Entered: 08/29/2012)
09/27/2012	226	REPLY MEMORANDUM OF LAW in Support re: 165 MOTION to Dismiss *the Amended Complaints of the Schwab Plaintiffs*. Document filed by [defendants identified in Gelboim docket entry 1]. (Wise, Robert) (Entered: 09/27/2012)
09/27/2012	227	REPLY MEMORANDUM OF LAW in Support re: 165 MOTION to Dismiss *the Amended Complaints. of the Exchange-Based Plaintiffs' Claims*. Document filed by [defendants identified in Gelboim docket entry 1]. (Wise, Robert) (Entered: 09/27/2012)
09/27/2012	228	REPLY MEMORANDUM OF LAW in Support re: 165 MOTION

		to Dismiss *the Amended Complaints. of Plaintiffs' Antitrust Claims*. Document filed by [defendants identified in Gelboim docket entry 1]. (Wise, Robert) (Entered: 09/27/2012)
09/27/2012	229	SUPPLEMENTAL REPLY MEMORANDUM OF LAW in Support re: 165 MOTION to Dismiss *the Amended Complaints*. Document filed by Bank of Tokyo- Mitsubishi UFJ Ltd, Credit Suisse Group AG. (Washer, Herbert) (Entered: 09/27/2012)
09/27/2012	230	DECLARATION of Robert F. Wise, Jr. in Support re: 165 MOTION to Dismiss *the Amended Complaints*.. Document filed by [defendants identified in Gelboim docket entry 1]. (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Wise, Robert) (Entered: 09/27/2012)
09/27/2012	231	REPLY MEMORANDUM OF LAW in Support re: 176 MOTION to Dismiss.. Document filed by Barclays Bank Plc,. (Scott, Jeffrey) (Entered: 09/27/2012)
09/27/2012	232	REPLY MEMORANDUM OF LAW in Support re: 178 MOTION to Dismiss.. Document filed by UBS AG. (Zweifach, Lawrence)

		(Entered: 09/27/2012)
01/15/2013	248	CERTIFIED TRUE COPY OF CONDITIONAL MDL TRANSFER IN ORDER FROM THE MDL PANEL (CTO-4) transferring this action from the United States District Court - that pursuant to 28 U.S.C. 1407, the actions listed on the attached schedule A and pending in the District of California, and the same hereby are, transferred to the Southern District of New York, with the consent of that court, assigned to the Honorable Judge Naomi Reice Buchwald, for coordinated or consolidated pretrial proceedings with the actions pending in that district and listed on Schedule A. (Signed by MDL Panel on 1/15/2013) (sjo) (Entered: 01/15/2013)
01/25/2013	253	CERTIFIED TRUE COPY OF CONDITIONAL MDL TRANSFER IN ORDER FROM THE MDL PANEL (CTO-5)transferring this action from the United States District Court - that pursuant to 28 U.S.C. 1407, the actions listed on the attached schedule A and pending in the District of California, and the same hereby are, transferred to

		the Southern District of New York, with the consent of that court, assigned to the Honorable Judge Naomi Reice Buchwald, for coordinated or consolidated pretrial proceedings with the actions pending in that district and listed on Schedule A. (Signed by MDL Panel on 1/25/2013) (sjo) (Entered: 01/25/2013)
02/15/2013	261	CERTIFIED TRUE COPY OF CONDITIONAL MDL TRANSFER IN ORDER FROM THE MDL PANEL(CTO-6) transferring this action from the United States District Court - that pursuant to 28 U.S.C. 1407, the actions listed on the attached schedule A and pending in the District of California, and the same hereby are, transferred to the Southern District of New York, with the consent of that court, assigned to the Honorable Judge Naomi Reice Buchwald, for coordinated or consolidated pretrial proceedings with the actions pending in that district and listed on Schedule A. (Signed by MDL Panel on 2/15/2012) (sjo) (Entered: 02/15/2013)
02/20/2013	263	CERTIFIED TRUE COPY OF CONDITIONAL MDL

		TRANSFER IN ORDER FROM THE MDL PANEL (CTO-7) transferring this action from the United States District Court - that pursuant to 28 U.S.C. 1407, the actions listed on the attached schedule A and pending in the District of Illinois, and the same hereby are, transferred to the Southern District of New York, with the consent of that court, assigned to the Honorable Judge Naomi Reice Buchwald, for coordinated or consolidated pretrial proceedings with the actions pending in that district and listed on Schedule A. (Signed by MDL Panel on 2/20/2013) (sjo) (Entered: 02/21/2013)
03/05/2013		Minute Entry for proceedings held before Judge Naomi Reice Buchwald: Oral Argument held on 3/5/2013 re: 176 MOTION to Dismiss. filed by Barclays Bank Plc,, 178 MOTION to Dismiss. filed by UBS AG. (djc) (Entered: 03/06/2013)
03/25/2013	282	TRANSCRIPT of Proceedings re: CONFERENCE held on 3/1/2012 before Judge Naomi Reice Buchwald. Court Reporter/Transcriber: Toni Stanley, (212) 805-0300.

		Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 4/18/2013. Redacted Transcript Deadline set for 4/29/2013. Release of Transcript Restriction set for 6/27/2013.Filed In Associated Cases: 1:11-md-02262-NRB et al. (Rodriguez, Somari) (Entered: 03/25/2013)
03/25/2013	283	NOTICE OF FILING OF OFFICIAL TRANSCRIPT Notice is hereby given that an official transcript of a CONFERENCE proceeding held on 3/1/12 has been filed by the court reporter/transcriber in the above-captioned matter. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days...Filed In Associated Cases: 1:11-md-02262-NRB et al.

		(Rodriguez, Somari) (Entered: 03/25/2013)
03/29/2013	286	MEMORANDUM AND ORDER granting in part and denying in part (165) Motion to Dismiss in case 1:11-md-02262-NRB; granting in part and denying in part Motion to Dismiss in case 1:13-cv-00598-NRB; granting in part and denying in part Motion to Dismiss in case 1:13-cv-00597-NRB; granting in part and denying in part Motion to Dismiss in case 1:12-cv-05723-NRB; granting in part and denying in part Motion to Dismiss in case 1:12-cv-05822-NRB; granting in part and denying in part Motion to Dismiss in case 1:12-cv-06056-NRB; granting in part and denying in part Motion to Dismiss in case 1:12-cv-06693-NRB; granting in part and denying in part Motion to Dismiss in case 1:12-cv-07461-NRB; granting in part and denying in part Motion to Dismiss in case 1:13-cv-00398-NRB; granting in part and denying in part Motion to Dismiss in case 1:13-cv-00626-NRB; granting in part and denying in part Motion to Dismiss in case 1:13-cv-00625-NRB; granting in part and denying in part Motion

		to Dismiss in case 1:13-cv-00627-NRB; granting in part and denying in part Motion to Dismiss in case 1:13-cv-00667-NRB; granting in part and denying in part Motion to Dismiss in case 1:13-cv-00346-NRB; granting in part and denying in part Motion to Dismiss in case 1:13-cv-00407-NRB; granting in part and denying in part Motion to Dismiss in case 1:13-cv-01135-NRB; granting in part and denying in part Motion to Dismiss in case 1:13-cv-01198-NRB; granting in part and denying in part Motion to Dismiss in case 1:13-cv-01456-NRB; granting in part and denying in part Motion to Dismiss in case 1:13-cv-01016-NRB. For the reasons stated above, defendants motions to dismiss are granted in part and denied in part. First, defendants motion to dismiss plaintiffs federal antitrust claim is granted. Regardless of whether defendants conduct constituted a violation of the antitrust law "antitrust injury." An antitrust injury is an injury that results from an anticompetitive aspect of defendants conduct. Here, although plaintiffs have alleged

		that defendants conspired to suppress LIBOR over a nearly three-year-long period and that they were injured as a result, they have not alleged that their injury resulted from any harm to competition. The process by which banks submit LIBOR quotes to the BBA is not itself competitive, and plaintiffs have not alleged that defendants conduct had an anticompetitive effect in any market in which defendants compete. Because plaintiffs have not alleged an antitrust injury, their federal antitrust claim is dismissed. Second, defendants' motion to dismiss plaintiffs' commodities manipulation claims is granted in part and denied in part. Contrary to defendants' arguments, plaintiffs' claims do not involve an impermissible extraterritorial application of the CEA, and plaintiffs have adequately pleaded their claims. However, certain of plaintiffs' claims are time-barred because numerous articles published in April and May 2008 in prominent national publications placed plaintiffs on notice of their injury. Therefore, plaintiffs commodities

		manipulation claims based on contracts entered into between August 2007 and May 29, 2008, are time-barred. However, plaintiffs claims based on contracts entered into between April 15, 2009, and May 2010 are not time-barred, and plaintiffs' claims based on contracts entered into between May 30, 2008, and April 14, 2009, may or may not be barred, though we willnot dismiss them at this stage. Additionally, because the Barclays settlements broughtto light information that plaintiffs might not previously have been able to learn, we grant plaintiffs leave to move to amend their complaint to include allegations based on such information, provided that any such motion addresses the concerns raised herein and is accompanied by a proposed second amended complaint. Third, defendants' motion to dismiss plaintiffs' RICO claim is granted. For one, the PSLRA bars plaintiffs from bringing a RICO claim based on predicate acts that could have been the subject of a securities fraud action. Here, the predicate acts of mail and wire fraud underlying plaintiffs' RICO

		claim could have been the subject of a claim for securities fraud. Additionally, RICO applies only domestically, meaning that the alleged enterprise must be a domestic enterprise. However, the enterprise alleged by plaintiffs is based in England. For these reasons, plaintiffs RICO claim is dismissed. Finally, plaintiffs' state-law claims are all dismissed, some with prejudice and some without. Plaintiffs' Cartwright Act claim is dismissed with prejudice for lack of antitrust injury. The exchange-based plaintiffs' New York common law unjust enrichment claim is also dismissed with prejudice, as plaintiffs have not alleged any relationship between them and defendants. With regard to the remaining state-law claims, we decline to exercise supplemental jurisdiction and We recognize that it might be unexpected that we are dismissing a substantial portion of plaintiffs claims, given that several of the defendants here have already paid penalties to government regulatory agencies reaching into the billions of dollars. However, these results

		are not as incongruous as they might seem. Under the statutes invoked here, there are many requirements that private plaintiffs must satisfy, but which government agencies need not. The reason for these differing requirements is that the focuses of public enforcement and private enforcement, even of the same statutes, are not identical. The broad public interests behind the statutes invoked here, such as integrity of the markets and competition, are being addressed by ongoing governmental enforcement. While public enforcement is often supplemented by suits brought by private parties acting as "private attorneys general," those private actions which seek damages and attorneys fees must be examined closely to ensure that the plaintiffs who are suing are the ones properly entitled to recover and that the suit is, in fact, serving the public purposes of the laws being invoked. Therefore, although we are fully cognizant of the settlements that several of the defendants here have entered into with government regulators, we find that only some of the

		claims that plaintiffs have asserted may properly proceed. (Signed by Judge Naomi Reice Buchwald on 3/29/2013) Filed In Associated Cases: 1:11-md-02262-NRB et al. (tro) (Entered: 03/29/2013)
04/04/2013	291	CERTIFIED TRUE COPY OF CONDITIONAL MDL TRANSFER IN ORDER FROM THE MDL PANEL... transferring this action from the United States District Court - that pursuant to 28 U.S.C. 1407, the actions listed on the attached schedule A and pending in the District of Massachusetts, and the same hereby are, transferred to the Southern District of New York, with the consent of that court, assigned to the Honorable Judge Naomi Reice Buchwald, for coordinated or consolidated pretrial proceedings with the actions pending in that district and listed on Schedule A. (Signed by MDL Panel on 4/4/2013) (sjo) (Entered: 04/04/2013)
04/12/2013	296	MOTION for Reconsideration re; 286 Order on Motion to Dismiss. Document filed by Credit Suisse Group AG, The Bank of Tokyo-Mitsubishi UFJ, Ltd., The

		Norinchukin Bank. (Libow, Daryl) (Entered: 04/12/2013)
04/12/2013	297	MEMORANDUM OF LAW in Support re: 296 MOTION for Reconsideration re; 286 Order on Motion to Dismiss, MOTION for Reconsideration re; 286 Order on Motion to Dismiss, MOTION for Reconsideration re; 286 Order on Motion to Dismiss. Document filed by Credit Suisse Group AG, The Bank of Tokyo-Mitsubishi UFJ, Ltd., The Norinchukin Bank. (Libow, Daryl) (Entered: 04/12/2013)
04/29/2013	306	MEMORANDUM OF LAW in Opposition re: 296 MOTION for Reconsideration re; 286 Order on Motion to Dismiss, MOTION for Reconsideration re; 286 Order on Motion to Dismiss, MOTION for Reconsideration re; 286 Order on Motion to Dismiss *Exchange-Based Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Reconsideration or Reargument*. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Capital GMBH, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH.

		(Kovel, David) (Entered: 04/29/2013)
05/03/2013	308	CERTIFIED TRUE COPY OF CONDITIONAL MDL TRANSFER IN ORDER FROM THE MDL PANEL(CTO-10)transferring this action from the United States District Court - that pursuant to 28 U.S.C. 1407, the actions listed on the attached schedule A and pending in the District of Wisconsin, and the same hereby are, transferred to the Southern District of New York, with the consent of that court, assigned to the Honorable Judge Naomi Reice Buchwald, for coordinated or consolidated pretrial proceedings with the actions pending in that district and listed on Schedule A. (Signed by MDL Panel on 5/3/2013) (sjo) (Entered: 05/03/2013)
05/03/2013	309	MEMORANDUM: We have received a number of letters since issuing our Memorandum and Order of March 29, 2013 (the "Memorandum and Order"). These letters generally address four topics: (1) plaintiffs' request for leave to amend their amended complaints with regard to antitrust injury; (2) the motion

		for reconsideration filed by defendants The Bank of Tokyo-Mitsubishi UFJ, Ltd. ("BTMU"), Credit Suisse Group AG, and The Norinchukin Bank; (3) requests to lift the stay imposed by our Memorandum and Order of August 14, 2012 by plaintiffs whose cases are subject to the stay; and (4) the exchange-based plaintiffs' request for leave to move for interlocutory appeal of a part of our Memorandum and Order. We will address these topics in turn. Based on the submissions to date, this Court could not enter such a certification. Nonetheless, to give exchange-based plaintiffs a full opportunity to support their position, we will accept a reply submission within two (2) weeks. Furthermore, we will treat the application as a letter motion for section 1292(b) certification and will file all the submissions on the docket when we issue our decision. (Signed by Judge Naomi Reice Buchwald on 5/3/2013) Filed In Associated Cases: 1:11-md-02262-NRB et al. (rsh) Modified on 5/13/2013 (rsh). (Entered: 05/03/2013)

05/07/2013	310	Letter addressed to Judge Naomi Reice Buchwald from William Christopher Carmody and Karen L. Morris dated 4/12/2013 re: We write jointly on behalf of plaintiffs Mayor and City Council of Baltimore and City of New Britain Firefighters' and Police Benefit Fund; and Ellen Gelboim and Linda Zacher. Pursuant to Your Honor's Individual Practices, we respectfully request a pre-motion conference to address the filing of motions for leave to amend the complaints in our respective actions. (sac) Modified on 5/7/2013 (sac). (Entered: 05/07/2013)
05/07/2013	311	Letter addressed to Judge Naomi Reice Buchwald from Christopher Lovell and David E. Kovel dated 4/18/2013 re: After Your Honor's Order, dated March 29, 2013 (Dkt. No. 286), on the motions to dismiss, the Exchange-Based Plaintiffs are in a somewhat different procedural position from the other Plaintiffs. Nonetheless, after consideration, the Exchange-Based Plaintiffs respectfully join in the request made by the other class Plaintiffs for permission to move for leave to amend their complaints with

		respect to the antitrust claims. (sac) Modified on 5/7/2013 (sac). (Entered: 05/07/2013)
05/07/2013	313	Letter addressed to Judge Naomi Reice Buchwald from Robert F. Wise dated 4/24/2013 re: Defendants respectfully request that the Court deny the OTC and Bondholder Plaintiffs' request as well as deny the Exchange Based Plaintiffs' motion for leave to move to amend in any manner not expressly granted in the Court's Order. (sac) Modified on 5/7/2013 (sac). (Entered: 05/07/2013)
05/07/2013	315	Letter addressed to Judge Naomi Reice Buchwald from Karen L. Morris and David H. Weinstein dated 4/30/2013 re: This letter is respectfully submitted on behalf on behalf of the Bondholder Plaintiffs in response to Mr. Wise's letter of April 24, 2013. In his letter, Mr. Wise argues on behalf of the Defendants that the Court should deny the request of the OTC and Bondholder Plaintiffs for leave to file motions for leave to amend their complaints, contending that such motions would be improper and that such amended pleadings

		would be futile. The Bondholder Plaintiffs respectfully submit that their proposed motion is not improper, and that the appropriate context for Defendants' arguments regarding futility of the proposed amended pleadings would be in briefing in opposition to the proposed motions. (sac) Modified on 5/7/2013 (sac). (Entered: 05/07/2013)
05/07/2013	316	Letter addressed to Judge Naomi Reice Buchwald from David E. Kovel, Esq. dated 4/22/2013 re: In accordance with Rule 2.A of Your Honor's Individual Practices, the Exchange-Based Plaintiffs respectfully request leave to file a motion for certification of this Court's March 29, 2013 Order [Dkt. No. 286] for interlocutory appeal pursuant 28 U.S.C. § 1292(b). Such interlocutory appeal would seek review of this controlling legal question: Whether LIB OR is the "commodity underlying" the Eurodollar futures contract within the meaning of Section 22(a)(1)(D) of the Commodity Exchange Act ("CEA"). (rdz) (Entered: 05/07/2013)

05/07/2013	317	Letter addressed to Judge Naomi Reice Buchwald from William Christopher Carmody dated 4/30/2013 re: We write on behalf of the OTC plaintiffs in response to defendants' letter dated April 24, 2013. Defendants' opposition to our request for a pre-motion conference is meritless for three reasons stated in this letter. Plaintiffs respectfully submit that their proposed amended complaint willnot be futile and that granting leave to amend is consistent with the "permissive standard" for amendment under Fed. R. Civ. P. 15(a)(2). (sac) Modified on 5/7/2013 (sac). (Entered: 05/07/2013)
05/07/2013	319	Letter addressed to Judge Naomi Reice Buchwald from Robert F. Wise dated 5/1/2013 re: As liaison counsel for Defendants, we write in response to the Exchange-Based Plaintiffs' letter to the Court dated April 22, 2013, seeking a pre-motion conference to consider their request to file a motion for certification of this Court's March 29, 2013 Order, for interlocutory appeal pursuant to 28 U.S.C. 1292(b). For all of these reasons, the Exchange-Based Plaintiffs' request for leave to file

		a motion for certification should be denied. (sac) Modified on 5/7/2013 (rdz). (Entered: 05/07/2013)
05/09/2013	320	REPLY MEMORANDUM OF LAW in Support re: 296 MOTION for Reconsideration re; 286 Order on Motion to Dismiss, MOTION for Reconsideration re; 286 Order on Motion to Dismiss, MOTION for Reconsideration re; 286 Order on Motion to Dismiss. Document filed by Credit Suisse Group AG, The Bank of Tokyo-Mitsubishi UFJ, Ltd., The Norinchukin Bank. (Libow, Daryl) (Entered: 05/09/2013)
05/16/2013	325	TRANSCRIPT of Proceedings re: ORAL ARGUMENT held on 3/5/2013 before Judge Naomi Reice Buchwald. Court Reporter/Transcriber: Khristine Sellin, (212) 805- 0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 6/10/2013. Redacted Transcript Deadline set for

		6/20/2013. Release of Transcript Restriction set for 8/19/2013.Filed In Associated Cases: 1:11-md-02262-NRB et al. (Rodriguez, Somari) (Entered: 05/16/2013)
05/16/2013	326	NOTICE OF FILING OF OFFICIAL TRANSCRIPT Notice is hereby given that an official transcript of a ORAL ARGUMENT proceeding held on 3/5/13 has been filed by the court reporter/transcriber in the above-captioned matter. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days...Filed In Associated Cases: 1:11-md-02262-NRB et al. (Rodriguez, Somari) (Entered: 05/16/2013)
05/17/2013	327	MOTION for Leave to File Second Amended Complaint. Document filed by Ellen Gelboim, Linda Zacher. (Attachments: # 1 Exhibit A - Bondholder Plaintiffs' Proposed Second Amended Complaint, # 2 Exhibit B-1 - Bondholder Plaintiffs' Proposed

		Second Amended Complaint - Redline (1 of 2), # 3 Exhibit B-2 - Bondholder Plaintiffs' Proposed Second Amended Complaint - Redline (2 of 2))(Weinstein, David) (Entered: 05/17/2013)
05/17/2013	328	MEMORANDUM OF LAW in Support re: 327 MOTION for Leave to File Second Amended Complaint.. Document filed by Ellen Gelboim, Linda Zacher. (Weinstein, David) (Entered: 05/17/2013)
05/17/2013	330	MOTION for Leave to File Second Amended Complaint *Notice of Exchange-Based Plaintiffs' Motion for Leave to Amend as to Antitrust Claims and File the Second Amended Consolidated Class Action Complaint.* Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Capital GMBH, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Kovel, David) (Entered: 05/17/2013)
05/17/2013	331	MEMORANDUM OF LAW in Support re: 330 MOTION for Leave to File Second Amended Complaint *Notice of Exchange-*

		Based Plaintiffs' Motion for Leave to Amend as to Antitrust Claims and File the Second Amended Consolidated Class Action Complaint.. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Capital GMBH, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Kovel, David) (Entered: 05/17/2013)
05/17/2013	332	DECLARATION of David E. Kovel in Support re: 330 MOTION for Leave to File Second Amended Complaint *Notice of Exchange-Based Plaintiffs' Motion for Leave to Amend as to Antitrust Claims and File the Second Amended Consolidated Class Action Complaint.*. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Capital GMBH, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Attachments: # 1 Exhibit A-1, # 2 Exhibit A-2, # 3 Exhibit A-3, # 4 Exhibit B-1, # 5 Exhibit B-2, # 6 Exhibit B-3)(Kovel, David)

		(Entered: 05/17/2013)
05/17/2013	333	MOTION to Amend/Correct *Consolidated Second Amended Complaint*. Document filed by City of New Britain Firefighters' and Police Benefit Fund, Mayor and City Council of Baltimore. (Carmody, William) (Entered: 05/17/2013)
05/17/2013	334	MEMORANDUM OF LAW in Support re: 333 MOTION to Amend/Correct *Consolidated Second Amended Complaint*.. Document filed by City of New Britain Firefighters' and Police Benefit Fund, Mayor and City Council of Baltimore. (Attachments: # 1 Exhibit A - Proposed Consolidated Second Amended Complaint, # 2 Exhibit B - Redline Version of Proposed Consolidated Second Amended Complaint) (Carmody, William) (Entered: 05/17/2013)
05/20/2013	335	REPLY MEMORANDUM OF LAW in Support re: 316 Letter,, *Motion to Certify the March 29, 2013 Order for Interlocutory Appeal*. Document filed by FTC Capital GMBH. (Lovell, Christopher) (Entered: 05/20/2013)

05/20/2013	338	DECLARATION of David E. Kovel in Support re: 330 MOTION for Leave to File Second Amended Complaint *Notice of Exchange-Based Plaintiffs' Motion for Leave to Amend as to Antitrust Claims and File the Second Amended Consolidated Class Action Complaint.*. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Capital GMBH, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Attachments: # 1 Exhibit A-1, # 2 Exhibit A-2, # 3 Exhibit B-1, # 4 Exhibit B-2, # 5 Exhibit B-3)(Kovel, David) (Entered: 05/20/2013)
05/23/2013	341	MOTION for Leave to File Second Amended Complaint *Notice of Exchange-Based Plaintiffs' Motion for Leave to Amend as to Commodity Exchange Act Claims and File the Second Amended Consolidated Class Action Complaint.* Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Capital GMBH, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes,

		Metzler Investment GmbH. (Kovel, David) (Entered: 05/23/2013)
05/23/2013	342	DECLARATION of David E. Kovel in Support re: 341 MOTION for Leave to File Second Amended Complaint *Notice of Exchange-Based Plaintiffs' Motion for Leave to Amend as to Commodity Exchange Act Claims and File the Second Amended Consolidated Class Action Complaint*.. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Capital GMBH, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Attachments: # 1 Exhibit A, # 2 Exhibit B-1, # 3 Exhibit B-2)(Kovel, David) (Entered: 05/23/2013)
05/23/2013	343	MEMORANDUM OF LAW in Support re: 341 MOTION for Leave to File Second Amended Complaint *Notice of Exchange-Based Plaintiffs' Motion for Leave to Amend as to Commodity Exchange Act Claims and File the Second Amended Consolidated Class Action Complaint*.. Document filed by FTC Capital

		GMBH, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Kovel, David) (Entered: 05/23/2013)
05/24/2013	347	DECLARATION of David E. Kovel in Support re: 341 MOTION for Leave to File Second Amended Complaint *Notice of Exchange-Based Plaintiffs' Motion for Leave to Amend as to Commodity Exchange Act Claims and File the Second Amended Consolidated Class Action Complaint*.. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Capital GMBH, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Attachments: # 1 Exhibit C-1, # 2 Exhibit C-2)(Kovel, David) (Entered: 05/24/2013)
07/01/2013	362	MEMORANDUM OF LAW in Opposition re: 341 MOTION for Leave to File Second Amended Complaint *Notice of Exchange-Based Plaintiffs' Motion for Leave to Amend as to Commodity Exchange Act Claims and File the Second Amended Consolidated*

		Class Action Complaint. On behalf of all joining Defendants. Document filed by Barclays PLC. (Scott, Jeffrey) (Entered: 07/01/2013)
07/01/2013	363	DECLARATION of Matthew J. Porpora in Opposition re: 341 MOTION for Leave to File Second Amended Complaint *Notice of Exchange-Based Plaintiffs' Motion for Leave to Amend as to Commodity Exchange Act Claims and File the Second Amended Consolidated Class Action Complaint.*. Document filed by Barclays PLC. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N, # 15 Exhibit O, # 16 Exhibit P, # 17 Exhibit Q, # 18 Exhibit R, # 19 Exhibit S, # 20 Exhibit T, # 21 Exhibit U, # 22 Exhibit V, # 23 Exhibit W, # 24 Exhibit X) (Scott, Jeffrey) (Entered: 07/01/2013)
07/12/2013	364	ENDORSED LETTER addressed to Judge Naomi Reice Buchwald from Christopher Lovell, Esq. and David E. Kovel, Esq. dated

		7/10/2013 re: Counsel requests permission to file a reply brief of no more than 17 pages in length in response to Defendants' Opposition to Plaintiffs' Motion For Leave To Amend ("Opposition Brief") [Dkt. No. 362]. ENDORSEMENT: Application granted, but plaintiffs are encouraged (strongly) to keep their papers as short as possible. (Signed by Judge Naomi Reice Buchwald on 7/11/2013) (ft) (Entered: 07/12/2013)
07/22/2013	366	REPLY MEMORANDUM OF LAW in Support re: 341 MOTION for Leave to File Second Amended Complaint *Notice of Exchange-Based Plaintiffs' Motion for Leave to Amend as to Commodity Exchange Act Claims and File the Second Amended Consolidated Class Action Complaint.*. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Capital GMBH, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Kovel, David) (Entered: 07/22/2013)
07/22/2013	367	REPLY AFFIDAVIT of David E.

		Kovel in Support re: 341 MOTION for Leave to File Second Amended Complaint *Notice of Exchange-Based Plaintiffs' Motion for Leave to Amend as to Commodity Exchange Act Claims and File the Second Amended Consolidated Class Action Complaint.*. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Capital GMBH, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N, # 15 Exhibit O)(Kovel, David) (Entered: 07/22/2013)
07/24/2013	368	CERTIFIED TRUE COPY OF CONDITIONAL MDL TRANSFER IN ORDER FROM THE MDL PANEL(CTO-13) transferring this action from the United States District Court - that pursuant to 28 U.S.C. 1407, the actions listed on the attached schedule A and pending in the District of California, and the

		same hereby are, transferred to the Southern District of New York, with the consent of that court, assigned to the Honorable Judge Naomi Reice Buchwald, for coordinated or consolidated pretrial proceedings with the actions pending in that district and listed on Schedule A. (Signed by MDL Panel on 7/24/2013) (sjo) (Entered: 07/24/2013)
08/02/2013	374	MEMORANDUM OF LAW in Opposition re: 333 MOTION to Amend/Correct *Consolidated Second Amended Complaint*.. Document filed by Bank of America Corporation, Bank of America N.A., Bank of Tokyo-Mitsubishi UFJ Ltd., Barclays PLC, Citibank, N.A., Citigroup, Inc., Cooperatieve Centrale Raiffeisen- Boerenleenbank B.A., Credit Suisse Group AG, Deutsche Bank AG, HSBC Bank plc, HSBC Holdings plc, J.P. Morgan Chase & Co., J.P. Morgan Chase Bank, N.A., Portigon AG, Royal Bank of Canada, Royal Bank of Scotland Group plc, The Norinchukin Bank, UBS AG. (Wise, Robert) (Entered: 08/02/2013)
08/06/2013	375	FILING ERROR - DEFICIENT

		DOCKET ENTRY - (SEE DOCUMENT #376) REPLY MEMORANDUM OF LAW in Support re: 333 MOTION to Amend/Correct *Consolidated Second Amended Complaint*.. Document filed by City of New Britain Firefighters' and Police Benefit Fund. (Subramanian, Arun) Modified on 8/8/2013 (lb). (Entered: 08/06/2013)
08/06/2013	376	REPLY MEMORANDUM OF LAW in Support re: 333 MOTION to Amend/Correct *Consolidated Second Amended Complaint*.. Document filed by City of New Britain Firefighters' and Police Benefit Fund. (Subramanian, Arun) (Entered: 08/06/2013)
08/08/2013		Minute Entry for proceedings held before Judge Naomi Reice Buchwald: Oral Argument held on 8/8/2013 re: 341 MOTION for Leave to File Second Amended Complaint *Notice of Exchange-Based Plaintiffs' Motion for Leave to Amend as to Commodity Exchange Act Claims and File the Second Amended Consolidated Class Action Complaint*. filed by 303030 Trading LLC, FTC Futures Fund PCC Ltd, Atlantic Trading USA, LLC, Metzler

		Investment GmbH, Gary Francis, Nathaniel Haynes, FTC Capital GMBH, FTC Futures Fund SICAV, 327 MOTION for Leave to File Second Amended Complaint. filed by Linda Zacher, Ellen Gelboim, 296 MOTION for Reconsideration MOTION for Reconsideration re 286 Order on Motion to Dismiss MOTION for Reconsideration re; 286 Order on Motion to Dismiss filed by The Bank of Tokyo-Mitsubishi UFJ, Ltd., The Norinchukin Bank, Credit Suisse Group AG, 330 MOTION for Leave to File Second Amended Complaint *Notice of Exchange-Based Plaintiffs' Motion for Leave to Amend as to Antitrust Claims and File the Second Amended Consolidated Class Action Complaint*. filed by 303030 Trading LLC, FTC Futures Fund PCC Ltd, Atlantic Trading USA, LLC, Gary Francis, Metzler Investment GmbH, FTC Capital GMBH, Nathaniel Haynes, FTC Futures Fund SICAV, 333 MOTION to Amend/Correct *Consolidated Second Amended Complaint* filed by City of New Britain Firefighters' and Police Benefit Fund, Mayor and City Council of

		Baltimore. (cd) (Entered: 08/14/2013)
08/07/2013	378	CERTIFIED TRUE COPY OF CONDITIONAL MDL TRANSFER IN ORDER FROM THE MDL PANEL... transferring this action from the United States District Court - that pursuant to 28 U.S.C. 1407, the actions listed on the attached schedule A and pending in the District of Ohio, and the same hereby are, transferred to the Southern District of New York, with the consent of that court, assigned to the Honorable Judge Naomi Reice Buchwald, for coordinated or consolidated pretrial proceedings with the actions pending in that district and listed on Schedule A. (Signed by MDL Panel on 8/6/2013) (sjo) (Entered: 08/07/2013)
08/09/2013	380	CERTIFIED TRUE COPY OF CONDITIONAL MDL TRANSFER IN ORDER FROM THE MDL PANEL (CTO-14)transferring this action from the United States District Court - that pursuant to 28 U.S.C. 1407, the actions listed on the attached schedule A and pending in the District of California and Texas,

		and the same hereby are, transferred to the Southern District of New York, with the consent of that court, assigned to the Honorable Judge Naomi Reice Buchwald, for coordinated or consolidated pretrial proceedings with the actions pending in that district and listed on Schedule A. (Signed by MDL Panel on 8/9/2013) (sjo) (Entered: 08/09/2013)
08/22/2013	387	TRANSCRIPT of Proceedings re: ARGUMENT held on 8/8/2013 before Judge Naomi Reice Buchwald. Court Reporter/Transcriber: Steven Griffing, (212) 805-0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 9/16/2013. Redacted Transcript Deadline set for 9/26/2013. Release of Transcript Restriction set for 11/25/2013. (Rodriguez, Somari) (Entered: 08/22/2013)
08/22/2013	388	NOTICE OF FILING OF OFFICIAL TRANSCRIPT Notice

		is hereby given that an official transcript of a ARGUMENT proceeding held on 8/8/13 has been filed by the court reporter/transcriber in the above-captioned matter. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days... (Rodriguez, Somari) (Entered: 08/22/2013)
08/23/2013	389	MEMORANDUM AND ORDER denying (296) Motion for Reconsideration; denying (327) Motion for Leave to File Document; denying (330) Motion for Leave to File Document; granting in part and denying in part (333) Motion to Amend/Correct ; denying (341) Motion for Leave to File Document in case 1:11-md-02262-NRB. For the reasons stated above, the exchange-based plaintiffs' motion for interlocutory appeal is denied; the OTC, bondholder, and exchange-based plaintiffs' motions to add allegations with respect to

		antitrust are denied; the exchange-based plaintiffs' motion to add allegations with respect to trader-based manipulation is denied; BT-MU, Credit Suisse, and Norinchukin's motion for reconsideration is denied without prejudice to a similar motion being filed by defendants that addresses the issues raised herein; and, the OTC plaintiffs motion for leave to reassert their unjust enrichment claim and to add a claim for breach of implied covenant of good faith and fair dealing is granted. By September 10, 2013, the OTC plaintiffs and the exchange-based plaintiffs shall each file a second amended complaint that conforms with the rulings herein. If defendants believe that the new complaints are inconsistent with our rulings, they shall inform us by September 20, 2013. Further, if defendants wish to file a motion for reconsideration on grounds similar to those asserted in BT-MUs, Credit Suisse's, and Norinchukin's motion and which addresses the issues we have raised, they must file such a motion by September 20, 2013. Finally, if defendants intend to

		move for reconsideration of the March 29 Order on statute of limitations grounds or to make a renewed motion to dismiss with regard to "Period 2" claims, they must seek leave to file such a motion by September 20, 2013. This Memorandum and Order resolves docket entry nos. 296, 316, 327, 330, 333, and 341. (Signed by Judge Naomi Reice Buchwald on 8/23/2013) Filed In Associated Cases: 1:11-md-02262-NRB et al. (ft) (Entered: 08/23/2013)
08/26/2013	390	CERTIFIED TRUE COPY OF CONDITIONAL MDL TRANSFER IN ORDER FROM THE MDL PANEL (CTO-15) transferring this action from the United States District Court - that pursuant to 28 U.S.C. 1407, the actions listed on the attached schedule A and pending in the District of Iowa and Pennsylvania, and the same hereby are, transferred to the Southern District of New York, with the consent of that court, assigned to the Honorable Judge Naomi Reice Buchwald, for coordinated or consolidated pretrial proceedings with the actions pending in that district

		and listed on Schedule A. (Signed by MDL Panel on 8/26/2013) (sjo) (Entered: 08/26/2013)
09/06/2013	396	MOTION for Reconsideration re; 389 Order on Motion for Reconsideration, Order on Motion for Leave to File Document,, Order on Motion to Amend/Correct Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Capital GMBH, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Kovel, David) (Entered: 09/06/2013)
09/06/2013	397	MEMORANDUM OF LAW in Support re: 396 MOTION for Reconsideration re; 389 Order on Motion for Reconsideration, Order on Motion for Leave to File Document,, Order on Motion to Amend/Correct, [docket number and text repeats]. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Capital GMBH, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Kovel, David) (Entered: 09/06/2013)

09/06/2013	398	DECLARATION of David Kovel in Support re: 396 MOTION for Reconsideration [docket number and entry name repeats] Order on Motion for Leave to File Document, Order on Motion to Amend/Correct. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Capital GMBH, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)(Kovel, David) (Entered: 09/06/2013)
09/06/2013	399	CERTIFICATE OF SERVICE. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Capital GMBH, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Kovel, David) (Entered: 09/06/2013)
09/10/2013	402	LETTER addressed to Judge Naomi Reice Buchwald from Christopher Lovell and David Kovel dated September 10, 2013 re: Request for pre-motion conference. Document filed by 303030 Trading LLC, Atlantic

		Trading USA, LLC, FTC Capital GMBH, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Lovell, Christopher) (Entered: 09/10/2013)
09/10/2013	406	SECOND CONSOLIDATED AMENDED COMPLAINT amending 130 Amended Complaint,, against Bank of America Corporation, Bank of America N.A., Barclays Bank plc, Citibank N.A., Citigroup Inc, Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A., Credit Suisse Group AG, Credit Suisse International, Deutsche Bank AG, HBOS PLC, HSBC Bank plc, HSBC Holdings PLC, JPMorgan Chase Bank National Association, Lloyds Banking Group plc, Royal Bank of Canada, Societe Generale SA, The Bank of Tokyo Mitsubishi UFJ Ltd., The Norinchukin Bank, The Royal Bank of Scotland Group PLC, UBS AG, WestDeutsche Immobilienbank AG, WestLB AG with JURY DEMAND. Document filed by City of New Britain Firefighters' and Police Benefit Fund, Mayor and City Council of Baltimore, Texas Competitive

		Electric Holdings Company LLC. Related document: 130 Amended Complaint, filed by City of New Britain Firefighters' and Police Benefit Fund, Mayor and City Council of Baltimore. (mro) Modified on 9/12/2013 (mro). (Entered: 09/12/2013)
09/10/2013	407	SECOND CONSOLIDATED AMENDED COMPLAINT amending 134 Amended Complaint against Bank of America Corporation, Bank of America N.A., Barclays Bank PLC, Citibank N.A., Citigroup, Inc., Cooperatieve Centrale Raiffeisen- Boerenleenbank B.A., Credit Suisse Group AG, Deutsche Bank AG, HBOS PLC, HSBC Bank plc, HSBC Holdings plc, JPMorgan Chase & Co, JPMorgan Chase Bank N.A., Lloyds Banking Group PLC, Royal Bank of Canada, Royal Bank of Scotland Group plc, Societe Generale, The Bank of Tokyo Mitsubishi UFJ Ltd., The Norinchukin Bank, UBS AG, WestDeutsche Immobilienbank AG, WestLB AG with JURY DEMAND. Document filed by FTC Futures Fund SICAV, 303030 Trading LLC, Gary Francis, FTC Futures Fund PCC

		Ltd, Atlantic Trading USA, LLC, Nathaniel Haynes, Metzler Investment GmbH, Lloyds TBS Bank PLC, John Does 1-5. Related document: 134 Amended Complaint. (Received in the night deposit box on 9/10/13 at 8:07 pm) ***Also docketed in 11cv2613. (mro) (sdi). (Main Document 407 replaced on 9/12/2013) (sdi). (Additional attachment(s) added on 9/12/2013: # 1 Second Amended Complaint part 2) (sdi). (Entered: 09/12/2013)
09/11/2013	404	LETTER addressed to Judge Naomi Reice Buchwald from David E. Kovel and Christopher Lovell dated 09/11/2013 re: explanation of amendments included in Exchange-Based Plaintiffs' Second Amended Consolidated Class Action Complaint. Document filed by 303030 Trading LLC, AVP Properties, LLC, Atlantic Trading USA, LLC, Roberto E. Calle Gracey, Carpenters Pension Fund of West Virginia, Charles Schwab & Co., Inc., Charles Schwab Bank, N.A., City of Dania Beach Police & Firefighters' Retirement System, City of New Britain Firefighters' and Police Benefit Fund, FTC Capital GMBH, FTC

		Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Ellen Gelboim, Nathaniel Haynes, Richard Hershey, Jeffrey Laydon, Mayor and City Council of Baltimore, Metzler Investment GmbH, Ravan Investments, LLC, Schwab Advisor Cash Reserves, Schwab Cash Reserves, Schwab Investor Money Fund, Schwab Money Market Fund, Schwab Retirement Advantage Money Fund, Schwab Short-Term Bond Market Fund, Schwab Total Bond Market Fund, Schwab U.S. Dollar Liquid Assets Fund, Schwab Value Advantage Money Fund, Schwab Yieldplus Fund, Schwab Yieldplus Fund Liquidation Trust, The Charles Schwab Corporation, Linda Zacher. (Kovel, David) (Entered: 09/11/2013)
09/17/2013	408	LETTER addressed to Judge Naomi Reice Buchwald from David E. Kovel and Christopher Lovell dated 09/16/2013 re: Exchange-Based Plaintiffs Corrected Second Amended Consolidated Class Action Complaint. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Capital

		GMBH, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Kovel, David) (Entered: 09/17/2013)
9/17/2013	409	NOTICE OF APPEAL from (389 in 1:11-md-02262-NRB, [docket and case number repeat multiple times] Order on Motion for Reconsideration, Order on Motion for Leave to File Document,, Order on Motion to Amend/Correct (43 in 1:12-cv-01025-NRB, 43 in 1:12-cv-01025-NRB) Order on Motion to Dismiss (286 in 1:11-md-02262-NRB, [docket and case number repeat multiple times] Order on Motion to Dismiss (199 in 1:11-md-02262-NRB) Endorsed Letter (47 in 1:12-cv-01025-NRB) Order. Document filed by Ellen Gelboim, Linda Zacher. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. Filed In Associated Cases: 1:11-md-02262- NRB, 1:12-cv-01025-NRB (Weinstein, David) (Entered: 09/17/2013)
09/17/2013		Appeal Fee Paid electronically via Pay.gov: for (409 in 1:11-md-02262-NRB, 50 in 1:12-cv-01025-

		NRB) Notice of Appeal,. Filing fee $ 455.00. Pay.gov receipt number 0208-8877902, paid on 9/17/2013. Filed In Associated Cases: 1:11-md-02262-NRB, 1:12-cv-01025-NRB(nd) (Entered: 09/17/2013)
09/17/2013		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: (409 in 1:11-md-02262-NRB, 50 in 1:12-cv-01025-NRB) Notice of Appeal. Filed In Associated Cases: 1:11-md-02262-NRB, 1:12-cv-01025-NRB(nd) (Entered: 09/17/2013)
09/17/2013		Appeal Record Sent to USCA (Electronic File). [LIST OF RECORD DOCUMENTS OMITTED]
09/18/2013	414	LETTER MOTION for Conference addressed to Judge Naomi Reice Buchwald from William Christopher Carmody dated September 18, 2013. Document filed by Mayor and City Council of Baltimore.Filed In Associated Cases: 1:11-md-02262-NRB et al. (Ard, Seth) (Entered: 09/18/2013)
09/18/2013	415	LETTER addressed to Judge Naomi Reice Buchwald from Christopher Lovell dated

		September 18, 2013 re: Request for pre-motion conference. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Capital GMBH, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Lovell, Christopher) (Entered: 09/18/2013)
09/18/2013	416	LETTER addressed to Judge Naomi Reice Buchwald from Christopher Lovell dated September 18, 2013 re: Pre-motion conference. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Capital GMBH, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Lovell, Christopher) (Entered: 09/18/2013)
09/20/2013	417	LETTER addressed to Judge Naomi Reice Buchwald from Jeffrey T. Scott dated September 20, 2013 re: Leave to File Renewed Motion to Dismiss Exchange-Based Plaintiffs' Period 2 CEA Claims. Document filed by Barclays Bank PLC.

		(Attachments: # 1 Appendix Notice of Defendants' Renewed Motion to Dismiss, # 2 Appendix Memorandum in Support of Motion, # 3 Appendix Declaration of Matthew J. Porpora in Support of Motion, # 4 Exhibit Exhibits to Declaration of Matthew J. Porpora)(Scott, Jeffrey) (Entered: 09/20/2013)
09/20/2013	418	MOTION for Reconsideration re; 286 Order on Motion to Dismiss NOTICE OF MOTION FOR RECONSIDERATION OF MARCH 29, 2013 ORDER ON MOTION TO DISMISS. Document filed by UBS AG. (Sullivan, Peter) (Entered: 09/20/2013)
09/20/2013	419	MEMORANDUM OF LAW in Support re: 418 MOTION for Reconsideration re; 286 Order on Motion to Dismiss, MOTION for Reconsideration re; 286 Order on Motion to Dismiss, MOTION for Reconsideration re; 286 Order on Motion to Dismiss. Document filed by UBS AG. (Sullivan, Peter) (Entered: 09/20/2013)
09/20/2013	420	SUPPLEMENTAL MEMORANDUM OF LAW in Support re: 418 MOTION for

		Reconsideration re; 286 Order on Motion to Dismiss, MOTION for Reconsideration re; 286 Order on Motion to Dismiss, MOTION for Reconsideration re; 286 Order on Motion to Dismiss. Document filed by Credit Suisse Group AG, The Bank of Tokyo-Mitsubishi UFJ, Ltd., The Norinchukin Bank. (Libow, Daryl) (Entered: 09/20/2013)
09/20/2013	421	LETTER addressed to Judge Naomi Reice Buchwald from Robert F. Wise, Jr. dated September 20, 2013 re: Rule 2D. Document filed by Bank Of America Corporation, Bank of America, N.A., Citibank, N.A., Citigroup, Inc., Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A., Credit Suisse Group AG, Deutsche Bank AG, HBOS plc, HSBC Bank plc, HSBC Holdings plc, JP Morgan Chase & Co., JPMorgan Chase Bank N.A., Lloyds Banking Group plc, Portigon AG, Royal Bank of Canada, Royal Bank of Scotland Group plc, The Bank of Tokyo-Mitsubishi UFJ, Ltd., The Norinchukin Bank. (Wise, Robert) (Entered: 09/20/2013)

09/20/2013	422	LETTER addressed to Judge Naomi Reice Buchwald from Robert F. Wise, Jr. dated September 20, 2013 re: Second Amended Consolidated Class Action Complaint. Document filed by Bank of America Corporation, Bank of America, N.A., Bank of Tokyo-Mistsubishi UFJ, Barclays PLC, Citibank, N.A., Citigroup Inc, Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A., Credit Suisse Group AG, Deutsche Bank AG, HBOS plc, HSBC Bank plc, HSBC Holdings plc, J.P. Morgan Chase Bank, N.A., JP Morgan Chase & Co., Lloyds Banking Group plc, Portigon AG, Royal Bank of Canada, Royal Bank of Scotland Group plc, The Norinchukin Bank, UBS AG. (Wise, Robert) (Entered: 09/20/2013)
09/23/2013	423	TRANSCRIPT of Proceedings re: MOTION held on 8/8/2013 before Judge Naomi Reice Buchwald. Court Reporter/Transcriber: Steven Griffing, (212) 805-0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may

		be obtained through PACER. Redaction Request due 10/18/2013. Redacted Transcript Deadline set for 10/28/2013. Release of Transcript Restriction set for 12/26/2013. (McGuirk, Kelly) (Entered: 09/23/2013)
09/23/2013	424	NOTICE OF FILING OF OFFICIAL TRANSCRIPT Notice is hereby given that an official transcript of a MOTION proceeding held on 8/8/13 has been filed by the court reporter/transcriber in the above-captioned matter. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days... (McGuirk, Kelly) (Entered: 09/23/2013)
09/23/2013	426	LETTER addressed to Judge Naomi Reice Buchwald from Jeffrey T. Scott dated Sept. 23, 2013 re: Rule 2E Letter re: (1) Defendants' Opposition to Exchange-Based Plaintiffs' Reconsideration Motion, and (2) Defendants' Motion to Strike.

		Document filed by Barclays Bank PLC. (Scott, Jeffrey) (Entered: 09/23/2013)
09/23/2013	427	MEMORANDUM OF LAW in Opposition re: 396 MOTION for Reconsideration re; 389 Order on Motion for Reconsideration, Order on Motion for Leave to File Document,, Order on Motion to Amend/Correct, [docket number end entry repeat multiple times]. Document filed by Barclays Bank PLC. (Scott, Jeffrey) (Entered: 09/23/2013)
09/23/2013	428	MOTION to Strike Document No. 398 Declaration of David E. Kovel. Document filed by Barclays Bank PLC. (Scott, Jeffrey) (Entered: 09/23/2013)
09/24/2013	429	JOINT NOTICE OF APPEAL from 286 Order on Motion to Dismiss. Document filed by [Schwab entities]. Filing fee $ 455.00, receipt number 0208-8902473. Form C and Form D are due within 14 days to the Court of Appeals, Second Circuit. (Fineman, Steven) (Entered: 09/24/2013)
09/24/2013	430	LETTER addressed to Judge Naomi Reice Buchwald from Robert F. Wise, Jr. dated September 24, 2013 re: Response

		to the Exchange-Based Plaintiffs' Letter, dated September 10, 2013. Document filed by Bank Of America Corporation, Bank of America N.A., Bank of Tokyo-Mistsubishi UFJ, Barclays PLC, Citibank, N.A., Citigroup, Inc., Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A., Credit Suisse Group AG, Deutsche Bank AG, HBOS plc, HSBC Bank plc, HSBC Holdings plc, J.P. Morgan Chase Bank, N.A., JP Morgan Chase & Co., Lloyds Banking Group plc, Portigon AG, Royal Bank of Canada, Royal Bank of Scotland Group plc, The Norinchukin Bank, UBS AG. (Wise, Robert) (Entered: 09/24/2013)
09/25/2013		Transmission of Notice of Appeal and Certified Copy of Docket Sheet to US Court of Appeals re: 429 Notice of Appeal. (tp) (Entered: 09/25/2013)
09/25/2013		Appeal Record Sent to USCA (Electronic File). [LIST OF RECORD DOCUMENTS OMITTED]
09/27/2013	431	LETTER addressed to Judge Naomi Reice Buchwald from Robert F. Wise, Jr. dated September 27, 2013 re: Pre-

		Motion Conference. Document filed by Bank of America Corporation, Bank of America, N.A., Bank of Tokyo-Mitsubishi UFJ Ltd., Barclays PLC, Citibank, N.A., Citigroup, Inc., Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A., Credit Suisse Group AG, Deutsche Bank AG, HBOS plc, HSBC Bank plc, HSBC Holdings plc, JPMorgan Chase & Co., JPMorgan Chase Bank N.A., Lloyds Banking Group plc, Portigon AG, Royal Bank of Canada, Royal Bank of Scotland Group plc, The Norinchukin Bank, UBS AG. (Wise, Robert) (Entered: 09/27/2013)
09/30/2013	434	LETTER addressed to Judge Naomi Reice Buchwald from William Christopher Carmody dated September 30, 2013 re: repleading antitrust claim. Document filed by Mayor and City Council of Baltimore. (Attachments: # 1 Exhibit A)Filed In Associated Cases: 1:11-md-02262-NRB et al. (Ard, Seth) (Entered: 09/30/2013)
09/30/2013	435	LETTER addressed to Judge Naomi Reice Buchwald from David E. Kovel and Christopher

		Lovell dated September 30, 2013 re: Defendants' Letter dated September 20, 2013. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Capital GMBH, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Kovel, David) (Entered: 09/30/2013)
10/02/2013	437	CERTIFIED TRUE COPY OF CONDITIONAL MDL TRANSFER IN ORDER FROM THE MDL PANEL... transferring this action from the United States District Court - that pursuant to 28 U.S.C. 1407, the actions listed on the attached schedule A and pending in the District of California, and the same hereby are, transferred to the Southern District of New York, with the consent of that court, assigned to the Honorable Judge Naomi Reice Buchwald, for coordinated or consolidated pretrial proceedings with the actions pending in that district and listed on Schedule A. (Signed by MDL Panel on 10/2/2013) (sjo) (Entered: 10/02/2013)
09/30/2013	438	CORRECTED SECOND

		AMENDED COMPLAINT amending 407 Amended Complaint,,,, against Bank of America Corporation, Bank of America N.A., Barklays Bank Plc, Citibank, N.A., Citigroup Inc, Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A., Credit Suisse Group AG, Deutsche Bank AG, HBOS PLC, HSBC Bank PLC, HSBC Holdings PLC, J.P. Morgan Chase & Co., J.P. Morgan Chase Bank, N.A., John Does 1-5, Lloyds Banking Group PLC, Lloyds TSB Bank PLC, Royal Bank of Canada, Societe Generale, The Bank of Tokyo Mitsubishi UFJ Ltd., The Norinchukin Bank, UBS AG, Royal Bank of Scotland Group PLC, WestDeutsche Immobilienbank AG, WestLB AG with JURY DEMAND. Document filed by FTC Futures Fund SICAV, 303030 Trading LLC, Gary Francis, FTC Futures Fund PCC Ltd, Atlantic Trading USA, LLC, Nathaniel Haynes, Metzler Investment GmbH. Related document: 407 Amended Complaint,,,, filed by 303030 Trading LLC, FTC Futures Fund PCC Ltd, Atlantic Trading USA, LLC, Gary Francis, Metzler

		Investment GmbH, Nathaniel Haynes, FTC Futures Fund SICAV. (Attachments: # 1 Part 2)(mro) (Entered: 10/03/2013)
10/03/2013	439	REPLY MEMORANDUM OF LAW in Support re: 396 MOTION for Reconsideration re; 389 Order on Motion for Reconsideration, Order on Motion for Leave to File Document,, Order on Motion to Amend/Correct, [docket number and entries repeat]. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Capital GMBH, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Kovel, David) (Entered: 10/03/2013)
10/04/2013	441	LETTER addressed to Judge Naomi Reice Buchwald from David E. Kovel and Christopher Lovell dated October 4, 2013 re: courtesy copies of Plaintiffs Reply Memorandum of Law In Further Support of Their Motion for Reconsideration of the Courts August 23, 2013 Memorandum and Order. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Capital GMBH, FTC Futures Fund PCC

		Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Kovel, David) (Entered: 10/04/2013)
10/04/2013	442	LETTER addressed to Judge Naomi Reice Buchwald from Jeffrey T. Scott dated October 4, 2013 re: Response to Exchange-Based Plaintiffs' Letter dated September 18, 2013. Document filed by Barclays Bank PLC. (Scott, Jeffrey) (Entered: 10/04/2013)
10/04/2013	443	LETTER addressed to Judge Naomi Reice Buchwald from Robert F. Wise, Jr. dated 10/4/13 re: On Behalf of All Defendants in Response to Letters Dated 9/18/13 to your Honor from Counsel for the OTC and Exchange Based Plaintiffs. Document filed by BBA Enterprises, Ltd., BBA Libor, Ltd, BNP Paribas S.A., Bank Of America Corporation, Bank Of America Securities LLC, Bank of America Corp., Bank of America Corporation, Bank of America N.A., Bank of America, N.A., Bank of Nova Scotia, Bank of Tokyo-Mistsubishi UFJ, Bank of Tokyo-Mitsubishi UFJ Ltd, Bank

		of Tokyo-Mitsubishi UFJ Ltd., Barclays Bank PLC, Barclays Bank Plc,, Barclays Bank Plc., Barclays Bank plc, Barclays Capital Inc., Barclays PLC, Barclays U.S. Funding LLC, Barklays Bank Plc, British Bankers' Association, Centrale Raiffeisen- Berenleenbank B.A., Chase Bank USA, N.A., Chase Bank USA, NA, Citibank N.A., Citibank NA, Citibank, N.A., Citigroup Inc, Citigroup, Inc., CitigroupGlobal Markets Inc., Citizens Bank of Massachusetts, Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A., Cooperative Centrale Raiffeisen-Boernleenbank B.A., Cooperative Centrale Raiffeisenboernleenbank B.A., Coperatieve Centrale Raiffeisen-Boerenleenbank B.A., Credit Argicole, S.A., Credit Suisse Group AG, Credit Suisse Group, AG, Credit Suisse Group, NA, Credit Suisse International, Credit Suisse Securities (USA) LLC, Deutsche Bank AG, Deutsche Bank Financial LLC, Deutsche Bank Securities Inc., Does 1-10, Inclusive, HBOS PLC, HBOS Plc., HSBC Bank PLC, HSBC Bank Plc., HSBC Bank

		USA, N.A., HSBC Holding plc, HSBC Holdings PLC, HSBC Holdings plc., HSBC Securities (USA) Inc., J.P. Morgan Chase & Co., J.P. Morgan Chase Bank, N.A., J.P. Morgan Clearing Corp., JP Morgan Chase & Co., JPMorgan & Co., JPMorgan Chase & Co, JPMorgan Chase & Co., JPMorgan Chase Bank, JPMorgan Chase Bank N.A., JPMorgan Chase Bank National Association, JPMorgan Chase Bank, National Association, John Does 1-5, Lloyds Banking Group PLC, Lloyds Banking Group PLS, Lloyds Banking Group plc., Lloyds TSB Bank PLC, Mr. JPMorgan Chase Bank, N.A., Stephanie Nagel, National Association, National Collegiate Trust, Norinchukin Bank, Portigon AG, RBS Citizens, N.A., RBS Citizens, N.A. (f/k/a Citizens Bank of Massachusetts), Rabobank Group, Royal Bank of Canada, Royal Bank of Scotland, Royal Bank of Scotland Group plc, Societe General, Royal Bank of Canada, Societe Generale, Sumitomo Mitsui Banking Corp., The Bank of Tokyo Mitsubishi UFJ Ltd., The Bank of Tokyo-Mitsubishi UFJ Ltd., The Bank of

		Tokyo-Mitsubishi UFJ, Ltd., The Norinchukin Bank, The Royal Bank of Canada, The Royal Bank of Scotland Group PLC, The Royal Bank of Scotland Group Plc., The Royal Bank of Scotland Group plc, The Royal Bank of Scotland, Plc, UBS AG, UBS AG, Royal Bank of Scotland Group PLC, UBS Securities LLC, WestDeutsche Immobilienbank AG, WestLB AG. (Wise, Robert) (Entered: 10/04/2013)
10/04/2013	444	LETTER addressed to Judge Naomi Reice Buchwald from Steven Wolowitz dated October 4, 2013 re: Response to Exchange-Based Plaintiffs' Letter dated September 18, 2013. Document filed by Societe Generale. (Wolowitz, Steven) (Entered: 10/04/2013)
10/04/2013	445	LETTER addressed to Judge Naomi Reice Buchwald from Christopher Lovell dated October 4, 2013 re: Reply to Defendants' September 24, 2013 letter from Robert F. Wise to the Court. Document filed by FTC Capital GMBH.Filed In Associated Cases: 1:11-md-02262-NRB et al. (Lovell, Christopher) (Entered: 10/04/2013)

10/07/2013	446	RESPONSE in Opposition to Motion re: 418 MOTION for Reconsideration re; 286 Order on Motion to Dismiss, MOTION for Reconsideration re; 286 Order on Motion to Dismiss, MOTION for Reconsideration re; 286 Order on Motion to Dismiss, *Exchange-Based Plaintiffs' Response in Opposition to the Bank of Tokyo-Mitsubishi UFJ, Ltd., the Norinchukin Bank, and Credit Suisse Group AG's Supplemental Memorandum of Law in Support of Defendants' Motion for Reconsideration*. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Capital GMBH, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Kovel, David) (Entered: 10/07/2013)
10/07/2013	447	LETTER addressed to Judge Naomi Reice Buchwald from David E. Kovel and Christopher Lovell dated October 7, 2013 re: Letter Response to Dkt. No. 417 - Defendants' Letter Request dated September 20, 2013 to file the Renewed Motion to Dismiss the Exchange-Based Plaintiffs' Period 2 CEA Claims. Document filed by

		303030 Trading LLC, Atlantic Trading USA, LLC, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Kovel, David) (Entered: 10/07/2013)
10/07/2013	448	MEMORANDUM OF LAW in Opposition re: 418 MOTION for Reconsideration re; 286 Order on Motion to Dismiss, MOTION for Reconsideration re; 286 Order on Motion to Dismiss, MOTION for Reconsideration re; 286 Order on Motion to Dismiss, *Exchange-Based Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Reconsideration of the March 29, 2013 Order on the Motion to Dismiss*. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Kovel, David) (Entered: 10/07/2013)
10/08/2013	451	LETTER addressed to Judge Naomi Reice Buchwald from David E. Kovel and Christopher Lovell dated October 8, 2013 re: Exchange-Based Plaintiffs'

		Opposition to Defendants' Motion for Reconsideration of Mar. 29, 2013 Order. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Kovel, David) (Entered: 10/08/2013)
10/09/2013	452	MEMORANDUM AND ORDER: This Memorandum and Order is addressed to applications pending before the Court. First, defendants' request for leave to file their Renewed Motion to Dismiss the Exchange-Based Plaintiffs' Period 2 CEA Claims is granted. Second, a decision on the permissible content of the Second Consolidated Amended Complaints is stayed until the resolution of the current motions addressed to the complaints. The operative complaints willthen be denominated the Third Consolidated Amended Complaints. (Signed by Judge Naomi Reice Buchwald on 10/8/2013) Filed In Associated Cases: 1:11-md-02262-NRB et al. (ft) (Entered: 10/09/2013)
10/10/2013	453	MOTION to Dismiss *Exchange-*

		Based Plaintiffs' Period 2 CEA Claims. Document filed by Barclays Bank PLC. (Scott, Jeffrey) (Entered: 10/10/2013)
10/10/2013	454	MEMORANDUM OF LAW in Support re: 453 MOTION to Dismiss *Exchange- Based Plaintiffs' Period 2 CEA Claims*.. Document filed by Barclays Bank PLC. (Scott, Jeffrey) (Entered: 10/10/2013)
10/10/2013	455	DECLARATION of Matthew J. Porpora in Support re: 453 MOTION to Dismiss *Exchange-Based Plaintiffs' Period 2 CEA Claims*.. Document filed by Barclays Bank PLC. (Attachments: # 1 Exhibit)(Scott, Jeffrey) (Entered: 10/10/2013)
10/10/2013	456	LETTER addressed to Judge Naomi Reice Buchwald from Jeffrey T. Scott dated October 10, 2013 re: Rule 2.E.1. Letter for Defendants' Renewed Motion to Dismiss the Exchange-Based Plaintiffs' Period 2 CEA Claims. Document filed by Barclays Bank PLC. (Scott, Jeffrey) (Entered: 10/10/2013)
10/10/2013	457	LETTER addressed to Judge Naomi Reice Buchwald from William Christopher Carmody dated October 10, 2013 re: Partial

		Stay and Motion to Dismiss. Document filed by Mayor and City Council of Baltimore. (Attachments: # 1 Exhibit A)Filed In Associated Cases: 1:11-md-02262-NRB et al. (Carmody, William) (Entered: 10/10/2013)
10/15/2013	463	TRANSCRIPT of Proceedings re: MOTION held on 8/8/2013 before Judge Naomi Reice Buchwald. Court Reporter/Transcriber: Steven Griffing, (212) 805-0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 11/8/2013. Redacted Transcript Deadline set for 11/18/2013. Release of Transcript Restriction set for 1/16/2014. (McGuirk, Kelly) (Entered: 10/15/2013)
10/15/2013	464	NOTICE OF FILING OF OFFICIAL TRANSCRIPT Notice is hereby given that an official transcript of a MOTION proceeding held on 8/8/13 has been filed by the court reporter/transcriber in the above-captioned matter. The parties

		have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days... (McGuirk, Kelly) (Entered: 10/15/2013)
10/15/2013	465	MEMO ENDORSEMENT on re: (458 in 1:11-md-02262-NRB) Letter filed by Societe Generale, (165 in 1:11-cv-02613-NRB) Letter filed by Societe Generale S.A. ENDORSEMENT: The defendant (Societe Generale) is granted leave to move to dismiss without a pre-motion conference. (Signed by Judge Naomi Reice Buchwald on 10/11/2013) (tro) (Entered: 10/15/2013)
10/15/2013	467	LETTER addressed to Judge Naomi Reice Buchwald from Christopher Lovell dated 10/15/13 re: Charts of U.S. dollar Libor submissions for the dates listed in Docket Number 439 at p. 4 in response to the Court's direction on October 8, 2013. Document filed by FTC Capital GMBH. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit

		C)(Lovell, Christopher) (Entered: 10/15/2013)
10/16/2013	469	LETTER addressed to Judge Naomi Reice Buchwald from Christopher Lovell dated 10/16/13 re: Corrected copy of charts of U.S. dollar Libor submissions for the dates listed in Docket Number 439 at p. 4 in response to the Court's direction on October 8, 2013. Document filed by FTC Capital GMBH. (Attachments # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)Filed In Associated Cases: 1:11-md-02262-NRB et al. (Lovell, Christopher) (Entered: 10/16/2013)
10/17/2013	473	REPLY MEMORANDUM OF LAW in Support re: 418 MOTION for Reconsideration re; 286 Order on Motion to Dismiss MOTION for Reconsideration re; 286 Order on Motion to Dismiss, MOTION for Reconsideration re; 286 Order on Motion to Dismiss, *REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF MOTION FOR RECONSIDERATION OF MARCH 29, 2013 ORDER ON MOTION TO DISMISS.* Document filed by UBS AG. (Sullivan, Peter) (Entered:

		10/17/2013)
10/17/2013	474	SUPPLEMENTAL REPLY MEMORANDUM OF LAW in Support re: 418 MOTION for Reconsideration re; 286 Order on Motion to Dismiss, MOTION for Reconsideration re; 286 Order on Motion to Dismiss, MOTION for Reconsideration re; 286 Order on Motion to Dismiss. Document filed by Bank of Tokyo-Mitsubishi UFJ Ltd., Credit Suisse Group AG, Norinchukin Bank. (Libow, Daryl) (Entered: 10/17/2013)
10/18/2013	475	CERTIFIED TRUE COPY OF CONDITIONAL MDL TRANSFER IN ORDER FROM THE MDL PANEL (CTO-16)transferring this action from the United States District Court - that pursuant to 28 U.S.C. 1407, the actions listed on the attached schedule A and pending in the District of Kansas, and the same hereby are, transferred to the Southern District of New York, with the consent of that court, assigned to the Honorable Judge Naomi Reice Buchwald, for coordinated or consolidated pretrial proceedings with the actions pending in that district and listed on Schedule A. (Signed

		by MDL Panel on 10/18/2013) (sjo) (Entered: 10/18/2013)
10/18/2013	477	MEMO ENDORSED on re: 472 Letter filed by Barclays Bank PLC. ENDORSEMENT: Application granted. (Signed by Judge Naomi Reice Buchwald on 10/18/2013) (js) (Entered: 10/21/2013)
10/18/2013	478	MEMORANDUM AND ORDER re: (431 in 1:11-md-02262-NRB) Letter filed by The Norinchukin Bank, Bank of America Corporation, Citibank, N.A., Royal Bank of Canada, UBS AG, HSBC Bank PLC, HBOS PLC, HSBC Holdings PLC, Portigon AG, Deutsche Bank AG, Bank of Tokyo-Mitsubishi UFJ Ltd., HBOS plc, JPMorgan Chase Bank N.A., HSBC Bank plc, Royal Bank of Scotland Group plc, Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A., Barclays PLC, Lloyds Banking Group plc, HSBC Holdings plc, JPMorgan Chase & Co., Bank of America, N.A., HBOS Plc, Citigroup, Inc., Credit Suisse Group AG, Lloyds Banking Group PLC. This Memorandum and Order addresses the defendants' letter

		of September 27, 2013, which requests leave to move to dismiss the over-the-counter (OTC) plaintiffs' contract and unjust enrichment claims, and the OTC plaintiffs' response to that letter dated October 4, 2013. Defendants' request for leave to move to dismiss those claims is granted. After reviewing the letters from both sides, the Court requests that the parties address the following issues. First, please discuss the "conspiracy or concerted scheme[]" exception to the traditional requirement that, in order to have standing to sue a particular defendant under Fed. R. Civ. P. 23, the named plaintiff must have been injured by that defendant. Mahon v. Ticor Title Ins. Co., 683 F.3d 59,63 (2d Cir. 2012) (quoting La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 466 (9th Cir. 1973)). Second, assuming that the plaintiffs adequately pled the existence of a "concerted scheme" in setting LIBOR, is such a pleading sufficient for the plaintiffs to name all of the scheme's participants as defendants, even those who cannot be held liable under either an unjust

		enrichment or a breach of contract theory? The posing of these questions should not be interpreted as an indication that the Court regards the resolution of either as necessarily material, let alone dispositive. (Signed by Judge Naomi Reice Buchwald on 10/18/2013) Filed In Associated Cases: 1:11-md-02262-NRB et al. (ft) (Entered: 10/21/2013)
10/28/2013	487	MEMO ENDORSEMENT on (63 in 1:13-cv-07005-NRB) Letter filed by Schwab Advisor Cash Reserves, Schwab Short-Term Bond Market Fund, Schwab Value Advantage Money Fund, Schwab Retirement Advantage Money Fund, Schwab Total Bond Market Fund, Charles Schwab Corporation, Schwab Yieldplus Fund, Schwab Investor Money Fund, Schwab Cash Reserves, Charles Schwab & Co., Inc., Schwab U.S. Dolar Liquid Assets Fund, Schwab Yieldplus Fund Liquidation Trust, Charles Schwab Bank, N.A., Schwab Money Market Fund. ENDORSEMENT: Application granted. (Signed by Judge Naomi Reice Buchwald on 10/28/2013) Filed In Associated Cases: 1:11-md-02262-NRB, 1:13-cv-07005-

		NRB(ft) (Entered: 10/29/2013)
10/18/2013	490	MEMORANDUM AND ORDER: Pursuant to Fed. R. Civ. P. 54(b), final judgment is entered dismissing the first count of the over-the counter plaintiffs' consolidated amended complaint (Dkt. No. 130) for violation of section 1 of the Sherman Act, and denying leave to replead that claim in a proposed amended complaint (dkt. No. 334-1), for the reasons given in the March 29, 2013 and August 23, 2013 orders of this Court, and it is further ORDERED, pursuant to Fed. R. Civ. P. 54(b), final judgment is entered dismissing the fourth count of the exchange based plaintiffs' amended consolidated class action complaint (Dkt. No. 134) for violation of section 1 of the Sherman Act, and denying leave to replead that claim in a proposed amended complaint (Dkt. No. 332-1), for the reasons given in the March 29, 2013 and August 23, 2013 orders of this Court. (Signed by Judge Naomi Reice Buchwald on 10/17/2013) Filed In Associated Cases: 1:11-md-02262-NRB et al. (ft) (Entered: 10/30/2013)

10/18/2013		Transmission to Judgments and Orders Clerk. Transmitted re: (69 in 1:13-cv-07005- NRB, 43 in 1:12-cv-07461-NRB, 54 in 1:12-cv-05723-NRB, 97 in 1:13-cv-02297-NRB, 7 in 1:13-cv-07394-NRB, 44 in 1:13-cv-03952-NRB, 45 in 1:13-cv-00597- NRB, 34 in 1:13-cv-01016-NRB, 54 in 1:13-cv-00407-NRB, 35 in 1:13-cv-01456- NRB, 62 in 1:12-cv-05822-NRB, 490 in 1:11-md-02262-NRB, 55 in 1:12-cv- 06056-NRB, 44 in 1:13-cv-00625-NRB, 56 in 1:13-cv-01198-NRB, 49 in 1:13-cv-02343-NRB, 45 in 1:13-cv-03010-NRB, 55 in 1:13-cv-00598-NRB, 26 in 1:13-cv-06020-NRB, 44 in 1:13-cv-00667-NRB, 59 in 1:13-cv-01135-NRB, 24 in 1:13-cv-05616-NRB, 26 in 1:13-cv-06014-NRB, 34 in 1:13-cv-05511-NRB, 43 in 1:13-cv-00627-NRB, 26 in 1:13-cv-05569-NRB, 26 in 1:13-cv-05221-NRB, 52 in 1:13-cv-00346-NRB, 67 in 1:12-cv-01025-NRB, 63 in 1:13-cv-00398-NRB, 26 in 1:13-cv-06013-NRB, 33 in 1:13-cv-05187-NRB, 42 in 1:12-cv-06693-NRB, 43 in 1:13-cv-00626-NRB, 31 in 1:13-cv-05186-NRB) Order to the Judgments and Orders Clerk. Filed In Associated Cases: 1:11-md-02262-NRB et al. (ft) (Entered:

		10/30/2013)
10/22/2013	479	REPLY MEMORANDUM OF LAW in Opposition re: 396 MOTION for Reconsideration re; 389 Order on Motion for Reconsideration, Order on Motion for Leave to File Document,, Order on Motion to Amend/Correct, MOTION for Reconsideration re; 389 Order on Motion for Reconsideration, Order on Motion for Leave to File Document,, Order on Motion to Amend/Correct, MOTION for Reconsideration re; 389 Order on Motion for Reconsideration, Order on Motion for Leave to File Document,, Order on Motion to Amend/Correct, MOTION for Reconsideration re; 389 Order on Motion for Reconsideration, Order on Motion for Leave to File Document,, Order on Motion to Amend/Correct, MOTION for Reconsideration re; 389 Order on Motion for Reconsideration, Order on Motion for Leave to File Document,, Order on Motion to Amend/Correct, MOTION for Reconsideration re; 389 Order on Motion for Reconsideration, Order on Motion for Leave to File Document,, Order on Motion to Amend/Correct, MOTION for

		Reconsideration re; 389 Order on Motion for Reconsideration, Order on Motion for Leave to File Document,, Order on Motion to Amend/Correct. Document filed by Barclays Bank PLC. (Scott, Jeffrey) (Entered: 10/22/2013)
10/28/2013	483	MEMORANDUM OF LAW in Opposition re: 453 MOTION to Dismiss *Exchange- Based Plaintiffs' Period 2 CEA Claims*.. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Kovel, David) (Entered: 10/28/2013)
10/28/2013	484	DECLARATION of David E. Kovel in Opposition re: 453 MOTION to Dismiss *Exchange-Based Plaintiffs' Period 2 CEA Claims*.. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7

		Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N, # 15 Exhibit O, # 16 Exhibit P, # 17 Exhibit Q, # 18 Exhibit R, # 19 Exhibit S, # 20 Exhibit T)(Kovel, David) (Entered: 10/28/2013)
10/29/2013	488	LETTER addressed to Judge Naomi Reice Buchwald from David E. Kovel and Christopher Lovell dated October 29, 2013 re: Rule 2.E.1. letter for Exchange-Based Plaintiffs' Opposition to Defendants' Renewed Motion to Dismiss the Exchange-Based Plaintiffs' Period 2 CEA Claims. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Kovel, David) (Entered: 10/29/2013)
10/31/2013	491	Withdrawn pursuant to Order filed 10/31/13, Doc. #492, 11 MD 2262 - RULE 54(b) CLERK'S JUDGMENT That for the reasons stated in the Court's Memorandum and Order dated October 17, 2013, there is no just reason for delay, pursuant to Fed.

		R. Civ. P. 54(b), final judgment is entered dismissing the first count of the over-the- counter plaintiffs' consolidated amended complaint for violation of section 1 of the Sherman Act, and denying leave to replead that claim in a proposed amended complaint for the reasons given in the March 29, 2013 and August 23, 2013 orders of this Court, and there is no just reason for delay, pursuant to Fed. R. Civ. P. 54(b), final judgment is entered dismissing the fourth count of the exchange based plaintiffs' amended consolidated class action complaint for violation of section 1 of the Sherman Act, and denying leave to replead that claim in a proposed amended complaint for the reasons given in the March 29, 2013 and August 23, 2013 orders of this Court. (Signed by Clerk of Court Ruby Krajick on 10/31/13) (Attachments: # 1 Notice of Right to Appeal)Filed In Associated Cases: 1:11-md-02262-NRB et al. (ml) Modified on 10/31/2013 (ml). Modified on 11/4/2013 (ml). (Entered: 10/31/2013)
10/31/2013	492	ORDER: WHEREAS, on October 30, 2013 the Court of Appeals,

		acting sua sponte determined that it lacked jurisdiction over the bondholder and Schwab appeals and dismissed them, it is hereby ORDERED that the October 17, 2013 is withdrawn. (Signed by Judge Naomi Reice Buchwald on 10/31/2013) Filed In Associated Cases: 1:11-md-02262-NRB et al. (ama) (Entered: 10/31/2013)
11/05/2013	493	LETTER addressed to Judge Naomi Reice Buchwald from Christopher Lovell and David E. Kovel dated 11/05/2013 re: supplemental information relevant to the Exchange-Based Plaintiffs' motion to amend their operative pleading. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Kovel, David) (Entered: 11/05/2013)
11/07/2013	494	REPLY MEMORANDUM OF LAW in Support re: 453 MOTION to Dismiss *Exchange-Based Plaintiffs' Period 2 CEA Claims*.. Document filed by Barclays Bank

		PLC. (Scott, Jeffrey) (Entered: 11/07/2013)
11/11/2013	495	LETTER addressed to Judge Naomi Reice Buchwald from Robert F. Wise, Jr. dated November 11, 2013 re: in response to the Schwab Plaintiffs' supplemental letter brief concerning their motion to remand. Document filed by Bank of America Corporation, Bank of America N.A., Bank of Tokyo-Mitsubishi UFJ Ltd., Citibank N.A., Citigroup, Inc., Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A., Credit Suisse Group AG, Deutsche Bank AG, HBOS plc, HSBC Holdings plc, J.P. Morgan Chase & Co., J.P. Morgan Chase Bank, N.A., Lloyds Banking Group plc, Royal Bank of Canada, Royal Bank of Scotland Group plc, The Norinchukin Bank, Westlb AG. (Wise, Robert) (Entered: 11/11/2013)
11/12/2013	496	LETTER addressed to Judge Naomi Reice Buchwald from Robert F. Wise, Jr. dated November 12, 2013 re: the timing of Defendants motion to dismiss the unjust enrichment and breach of implied covenant claims

		asserted in the Second Amended Complaint filed by the OTC Plaintiffs. Document filed by Bank Of America Corporation, Bank of America, N.A., Bank of Tokyo-Mitsubishi UFJ Ltd., Citibank, N.A., Citigroup, Inc., Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A., Credit Suisse Group, AG, Deutsche Bank AG, HBOS plc, HSBC Holdings plc, J.P. Morgan Chase & Co., J.P. Morgan Chase Bank, N.A., Lloyds Banking Group plc, Royal Bank of Canada, Royal Bank of Scotland Group plc, The Norinchukin Bank, Westlb AG. (Wise, Robert) (Entered: 11/12/2013)
11/13/2013	497	LETTER addressed to Judge Naomi Reice Buchwald from David R. Gelfand dated November 13, 2013 re: Response to Exchange-Based Plaintiffs Letter, dated November 5, 2013. Document filed by Bank Of America Corporation, Bank of America, N.A., Barclays Bank PLC, Citibank NA, Citigroup, Inc., Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A., Credit Suisse Group AG, Deutsche Bank AG, HBOS PLC, HSBC Bank PLC, HSBC

		Holdings PLC, J.P. Morgan Chase & Co., J.P. Morgan Chase Bank, N.A., Lloyds Banking Group PLC, Lloyds TSB Bank PLC, Royal Bank of Canada, Royal Bank of Scotland Group plc, Societe Generale, The Bank of Tokyo-Mitsubishi UFJ, Ltd., The Norinchukin Bank, UBS AG, WestDeutsche Immobilienbank AG, WestLB AG. (Gelfand, David) (Entered: 11/13/2013)
11/26/2013	507	MOTION to Dismiss *OTC Plaintiffs' Second Consolidated Amended Complaint*. Document filed by Bank of America Corporation, Bank of America, N.A., Barclays PLC, Citibank, N.A., Citigroup, Inc., Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A., Credit Suisse Group AG, Deutsche Bank AG, HBOS plc, HSBC Bank plc, HSBC Holdings plc, JP Morgan Chase & Co., JPMorgan Chase Bank N.A., Lloyds Banking Group plc, Portigon AG, Royal Bank of Canada, Royal Bank of Scotland Group plc, Societe Generale, The Bank of Tokyo-Mitsubishi UFJ, Ltd., The Norinchukin Bank, UBS AG. (Wise, Robert) (Entered:

		11/26/2013)
11/26/2013	508	MEMORANDUM OF LAW in Support re: 507 MOTION to Dismiss *OTC Plaintiffs' Second Consolidated Amended Complaint*.. Document filed by Bank Of America Corporation, Bank of America, N.A., Barclays PLC, Citibank, N.A., Citigroup, Inc., Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A., Credit Suisse Group AG, Deutsche Bank AG, HBOS plc, HSBC Bank plc, HSBC Holdings plc., Lloyds Banking Group plc, Portigon AG, Royal Bank of Canada, Royal Bank of Scotland Group plc, Societe Generale, The Bank of Tokyo-Mitsubishi UFJ, Ltd., The Norinchukin Bank, UBS AG. (Wise, Robert) (Entered: 11/26/2013)
11/26/2013	509	LETTER addressed to Judge Naomi Reice Buchwald from Robert F. Wise, Jr. dated November 26, 2013 re: Individual Practice Rule 2.E.1. Document filed by Bank of America Corporation, Bank of America, N.A., Barclays PLC, Citibank, N.A., Citigroup, Inc., Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A., Credit

		Suisse Group AG, Deutsche Bank AG, HBOS plc, HSBC Bank plc, HSBC Holdings plc., JPMorgan Chase & Co., JPMorgan Chase Bank N.A., Lloyds Banking Group plc, Portigon AG, Royal Bank of Canada, Royal Bank of Scotland Group plc, Societe Generale, The Bank of Tokyo-Mitsubishi UFJ, Ltd., The Norinchukin Bank, UBS AG. (Wise, Robert) (Entered: 11/26/2013)
11/27/2013	511	MEMORANDUM AND ORDER: This Order addresses the Exchange-Based Plaintiffs' letter of November 5, 2013, which requested that they be allowed to amend their operative pleading to include information from the Rabobank settlement documents, and the defendants' response of November 13, 2013 opposing the plaintiffs' request. As with the Barclays settlement, we will permit the plaintiffs to rely on facts from the Rabobank settlement in their submissions rather than grant them leave to amend their complaint. Thus, the Court will consider these letters as supplemental briefing on the plaintiffs' September 6, 2013 Motion for Reconsideration of our

		August 23, 2013 Memorandum and Order, which denied the plaintiffs' motion to include trader-based claims in the Second Amended Class Action Complaint. If either side wants to submit further supplemental briefing, it may submit a memorandum not exceeding seven (7) pages in length. (Signed by Judge Naomi Reice Buchwald on 11/27/2013) Filed In Associated Cases: 1:11-md-02262-NRB et al. (ama) (Entered: 11/27/2013)
12/13/2013	512	CERTIFIED TRUE COPY OF CONDITIONAL MDL TRANSFER IN ORDER FROM THE MDL PANEL(CTO-17) transferring this action from the United States District Court - that pursuant to 28 U.S.C. 1407, the actions listed on the attached schedule A and pending in the District of California, and the same hereby are, transferred to the Southern District of New York, with the consent of that court, assigned to the Honorable Judge Naomi Reice Buchwald, for coordinated or consolidated pretrial proceedings with the actions pending in that district and listed on Schedule A. (Signed

		by MDL Panel on 12-3-2013) (sjo) (Entered: 12/03/2013)
12/13/2013	516	MOTION to Dismiss *NOTICE OF DEFENDANT SOCIETE GENERALE'S MOTION TO DISMISS EXCHANGE-BASED PLAINTIFFS' [CORRECTED] SECOND AMENDED CONSOLIDATED CLASS ACTION COMPLAINT.* Document filed by Societe Generale. (Wolowitz, Steven) (Entered: 12/13/2013)
12/13/2013	517	MEMORANDUM OF LAW in Support re: 516 MOTION to Dismiss *NOTICE OF DEFENDANT SOCIETE GENERALE'S MOTION TO DISMISS EXCHANGE- BASED PLAINTIFFS' [CORRECTED] SECOND AMENDED CONSOLIDATED CLASS ACTION COMPLAINT.*. Document filed by Societe Generale. (Wolowitz, Steven) (Entered: 12/13/2013)
12/13/2013	518	DECLARATION of Andrew J. Calica in Support re: 517 Memorandum of Law in Support of Motion,. Document filed by Societe Generale. (Attachments: # 1 Exhibit A- G)(Wolowitz, Steven)

		(Entered: 12/13/2013)
12/16/2013	519	LETTER addressed to Judge Naomi Reice Buchwald from Steven Wolowitz dated December 16, 2013 re: Societe Generale's Motion to Dismiss the Exchange-Based Plaintiffs' [Corrected] Second Amended Consolidated Class Action Complaint. Document filed by Societe Generale. (Wolowitz, Steven) (Entered: 12/16/2013)
12/30/2013	520	MEMORANDUM AND ORDER: For the foregoing reasons, the plaintiffs' motions to remand are denied. (Signed by Judge Naomi Reice Buchwald on 12/27/2013) Filed In Associated Cases: 1:11-md-02262-NRB, 1:13-cv-02297-NRB. **Docketed in 11- md-2262 as per Chambers. (mro) (Entered: 12/30/2013)
01/10/2014	522	LETTER MOTION for Conference *re 54(b) judgments on antitrust claims* addressed to Judge Naomi Reice Buchwald from William Christopher Carmody dated 01/10/2014. Document filed by Mayor and City Council of Baltimore. (Carmody, William) (Entered: 01/10/2014)

01/10/2014	523	SUPPLEMENTAL MEMORANDUM OF LAW in Support re: 396 MOTION for Reconsideration re; 389 Order on Motion for Reconsideration, Order on Motion for Leave to File Document,, Order on Motion to Amend/Correct, [docket number and entry repeat]. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Attachments: # 1 Exhibit A)(Kovel, David) (Entered: 01/10/2014)
01/10/2014	524	MEMORANDUM OF LAW in Opposition re: 516 MOTION to Dismiss *NOTICE OF DEFENDANT SOCIETE GENERALE'S MOTION TO DISMISS EXCHANGE- BASED PLAINTIFFS' [CORRECTED] SECOND AMENDED CONSOLIDATED CLASS ACTION COMPLAINT.*. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment

		GmbH. (Kovel, David) (Entered: 01/10/2014)
01/10/2014	525	DECLARATION of David E. Kovel in Opposition re: 516 MOTION to Dismiss *NOTICE OF DEFENDANT SOCIETE GENERALE'S MOTION TO DISMISS EXCHANGE-BASED PLAINTIFFS' [CORRECTED] SECOND AMENDED CONSOLIDATED CLASS ACTION COMPLAINT.*. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D, # 5 Exhibit E, # 6 Exhibit F, # 7 Exhibit G, # 8 Exhibit H, # 9 Exhibit I, # 10 Exhibit J, # 11 Exhibit K, # 12 Exhibit L, # 13 Exhibit M, # 14 Exhibit N, # 15 Exhibit O, # 16 Exhibit P, # 17 Exhibit Q, # 18 Exhibit R, # 19 Exhibit S, # 20 Exhibit T, # 21 Exhibit U)(Kovel, David) (Entered: 01/10/2014)
01/10/2014	526	MEMORANDUM OF LAW in Opposition re: 507 MOTION to Dismiss *OTC Plaintiffs' Second*

		Consolidated Amended Complaint.. Document filed by Mayor and City Council of Baltimore. (Carmody, William) (Entered: 01/10/2014)
01/13/2014	527	MANDATE of USCA (Certified Copy) as to (429 in 1:11-md-02262-NRB) Notice of Appeal,,,, filed by Schwab Advisor Cash Reserves, Schwab Short-Term Bond Market Fund, Schwab Value Advantage Money Fund, The Charles Schwab Corporation, Schwab Retirement Advantage Money Fund, Schwab Total Bond Market Fund, Schwab Yieldplus Fund, Schwab Investor Money Fund, Schwab Cash Reserves, Charles Schwab & Co., Inc., Schwab U.S. Dollar Liquid Assets Fund, Schwab Yieldplus Fund Liquidation Trust, Charles Schwab Bank, N.A., Schwab Money Market Fund, (409 in 1:11-md-02262-NRB, 50 in 1:12-cv-01025-NRB) Notice of Appeal filed by Linda Zacher, Ellen Gelboim USCA Case Number 13-3565(L); 13- 3636(con). This Court has determined sua sponte that it lacks jurisdiction over these appeals because a final order has not been issued by the district court as contemplated by

		28 U.S.C. § 1291, and the orders appealed from did not dispose of all claims in the consolidated action. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978); *Houbigant, Inc. v. IMG Fragrance Brands, LLC*, 627 F.3d 497, 498 (2d Cir. 2010) (per curiam). Upon due consideration, it is hereby ORDERED that the appeals are DISMISSED. Catherine O'Hagan Wolfe, Clerk USCA for the Second Circuit. Issued As Mandate: 01/13/2014. Filed In Associated Cases: 1:11-md-02262-NRB, 1:12-cv- 01025-NRB(nd) (Entered: 01/13/2014)
01/13/2014	528	LETTER addressed to Judge Naomi Reice Buchwald from David E. Kovel and Christopher Lovell dated January 13, 2014 re: Rule 2.E.1. Letter for Exchange-Based Plaintiffs' Supplemental Memorandum of Law Regarding Rabobank and in Further Support of Their Motion for Reconsideration of the Courts August 23, 2013 Memorandum and Order. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler

		Investment GmbH. (Kovel, David) (Entered: 01/13/2014)
01/13/2014	529	LETTER addressed to Judge Naomi Reice Buchwald from David E. Kovel and Christopher Lovell dated January 13, 2014 re: Rule 2.E.1. Letter for Exchange-Based Plaintiffs' Opposition to Defendant Societe Generale's Motion to Dismiss the Exchange-Based Plaintiffs' Corrected Second Amended Consolidated Class Action Complaint. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Kovel, David) (Entered: 01/13/2014)
01/21/2014	533	LETTER RESPONSE in Opposition to Motion addressed to Judge Naomi Reice Buchwald from Jeffrey T. Scott dated January 21, 2014 re: 522 LETTER MOTION for Conference *re 54(b) judgments on antitrust claims* addressed to Judge Naomi Reice Buchwald from William Christopher Carmody dated 01/10/2014.. Document filed by Barclays Bank

		PLC. (Scott, Jeffrey) (Entered: 01/21/2014)
01/21/2014	534	SUPPLEMENTAL MEMORANDUM OF LAW in Opposition re: 396 MOTION for Reconsideration re; 389 Order on Motion for Reconsideration, Order on Motion for Leave to File Document, Order on Motion to Amend/Correct, [docket number and entry repeats] filed by Bank of America Corporation, Bank of America, N.A., Barclays Bank PLC, Citibank NA, Citigroup, Inc., Cooperative Centrale Raiffeisen-Boernleenbank B.A., Credit Suisse Group AG, Deutsche Bank AG, HBOS PLC, HSBC Bank PLC, HSBC Holdings PLC, J.P. Morgan Chase & Co., J.P. Morgan Chase Bank, N.A., Lloyds Banking Group PLC, Lloyds TSB Bank PLC, Royal Bank of Canada, Royal Bank of Scotland Group plc, Societe Generale, The Bank of Tokyo-Mitsubishi UFJ, Ltd., The Norinchukin Bank, UBS AG, WestDeutsche Immobilienbank AG, WestLB AG. (Gelfand, David) (Entered: 01/21/2014)
01/28/2014	535	REPLY MEMORANDUM OF LAW in Support re: 516 MOTION

		to Dismiss *NOTICE OF DEFENDANT SOCIETE GENERALE'S MOTION TO DISMISS EXCHANGE-BASED PLAINTIFFS' [CORRECTED] SECOND AMENDED CONSOLIDATED CLASS ACTION COMPLAINT*.. Document filed by Societe Generale. (Wolowitz, Steven) (Entered: 01/28/2014)
01/28/2014	536	REPLY MEMORANDUM OF LAW in Support re: 507 MOTION to Dismiss *OTC Plaintiffs' Second Consolidated Amended Complaint*.. Document filed by Bank Of America Corporation, Bank of America, N.A., Barclays PLC, Citibank, N.A., Citigroup, Inc., Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A., Credit Suisse Group AG, Deutsche Bank AG, HBOS plc, HSBC Bank plc, HSBC Holdings plc., Lloyds Banking Group plc, Portigon AG, Royal Bank of Canada, Royal Bank of Scotland Group plc, Societe Generale, The Bank of Tokyo-Mitsubishi UFJ, Ltd., The Norinchukin Bank, UBS AG. (Wise, Robert) (Entered: 01/28/2014)
02/07/2014	540	LETTER addressed to Judge

		Naomi Reice Buchwald from David E. Kovel and Christopher Lovell dated February 7, 2014 re: questions raised during oral argument on February 4, 2014. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Kovel, David) (Entered: 02/07/2014)
02/11/2014	541	LETTER addressed to Judge Naomi Reice Buchwald from David Gelfand dated 02/11/2014 re: Response to Exchange-Based Plaintiffs' Letter dated February 7, 2014. Document filed by Bank Of America Corporation, Bank of America, N.A., Barclays Bank PLC, Citibank NA, Citigroup, Inc., Cooperative Centrale Raiffeisen- Boernleenbank B.A., Credit Suisse Group AG, Deutsche Bank AG, HBOS PLC, HSBC Bank PLC, HSBC Holdings PLC, J.P. Morgan Chase Bank, N.A., Lloyds Banking Group PLC, Lloyds TSB Bank PLC, Royal Bank of Canada, Royal Bank of Scotland Group plc, Societe Generale, The Bank of Tokyo-Mitsubishi UFJ,

		Ltd., The Norinchukin Bank, UBS AG, WestDeutsche Immobilienbank AG, WestLB AG. (Gelfand, David) (Entered: 02/11/2014)
02/25/2014	548	LETTER addressed to Judge Naomi Reice Buchwald from David R. Gelfand dated 02/25/2014 re: Response to Exchange-Based Plaintiffs' Letter dated February 7, 2014. Document filed by Bank of America Corporation, Bank of America, N.A., Barclays Bank PLC, Citibank NA, Citigroup, Inc., Cooperative Centrale Raiffeisen- Boernleenbank B.A., Credit Suisse Group AG, Deutsche Bank AG, HBOS PLC, HSBC Bank PLC, HSBC Holdings PLC, J.P. Morgan Chase Bank, N.A., Lloyds Banking Group PLC, Lloyds TSB Bank PLC, Royal Bank of Canada, Royal Bank of Scotland Group plc, Societe Generale, The Bank of Tokyo-Mitsubishi UFJ, Ltd., The Norinchukin Bank, UBS AG, WestDeutsche Immobilienbank AG, WestLB AG. (Gelfand, David) (Entered: 02/25/2014)
02/25/2014	549	TRANSCRIPT of Proceedings re:

		ARGUMENT held on 2/4/2014 before Judge Naomi Reice Buchwald. Court Reporter/Transcriber: Karen Gorlaski, (212) 805-0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 3/21/2014. Redacted Transcript Deadline set for 3/31/2014. Release of Transcript Restriction set for 5/30/2014. (Rodriguez, Somari) (Entered: 02/25/2014)
02/25/2014	550	NOTICE OF FILING OF OFFICIAL TRANSCRIPT Notice is hereby given that an official transcript of a ARGUMENT proceeding held on 2/4/14 has been filed by the court reporter/transcriber in the above-captioned matter. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days...

		(Rodriguez, Somari) (Entered: 02/25/2014)
02/25/2014	551	TRANSCRIPT of Proceedings re: ARGUMENT CORRECTED held on 2/4/2014 before Judge Naomi Reice Buchwald. Court Reporter/Transcriber: Karen Gorlaski, (212) 805-0300. Transcript may be viewed at the court public terminal or purchased through the Court Reporter/Transcriber before the deadline for Release of Transcript Restriction. After that date it may be obtained through PACER. Redaction Request due 3/21/2014. Redacted Transcript Deadline set for 3/31/2014. Release of Transcript Restriction set for 5/30/2014. (Rodriguez, Somari) (Entered: 02/25/2014)
02/25/2014	552	NOTICE OF FILING OF OFFICIAL TRANSCRIPT Notice is hereby given that an official transcript of a ARGUMENT CORRECTED proceeding held on 2/4/14 has been filed by the court reporter/transcriber in the above-captioned matter. The parties have seven (7) calendar days to file with the court a Notice of Intent to Request Redaction of this transcript. If no such Notice

		is filed, the transcript may be made remotely electronically available to the public without redaction after 90 calendar days... (Rodriguez, Somari) (Entered: 02/25/2014)
03/09/2014	554	LETTER addressed to Judge Naomi Reice Buchwald from David E. Kovel and Christopher Lovell dated March 9, 2014 re: Defendants' letter dated February 25, 2014. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Kovel, David) (Entered: 03/09/2014)
03/28/2014	557	LETTER addressed to Judge Naomi Reice Buchwald from Daryl A. Libow dated March 28, 2014 Document filed by The Bank of Tokyo-Mitsubishi UFJ, Ltd.. (Attachments: # 1 Exhibit)(Libow, Daryl) (Entered: 03/28/2014)
04/07/2014	558	LETTER addressed to Judge Naomi Reice Buchwald from Christopher Lovell dated 4/7/2014 re: Supplemental Authority. Document filed by 303030 Trading LLC, Atlantic Trading USA, LLC, FTC Capital GMBH,

		FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Attachments: # 1 Exhibit)(Lovell, Christopher) (Entered: 04/07/2014)
04/24/2014	560	LETTER addressed to Judge Naomi Reice Buchwald from Thomas C. Rice dated April 24, 2014 re: Response to the Over-the-Counter Plaintiffs' Letter dated April 17, 2014. Document filed by J.P. Morgan Chase & Co., J.P. Morgan Chase Bank, N.A.. (Rice, Thomas) (Entered: 04/24/2014)
05/01/2014	561	CERTIFIED TRUE COPY OF CONDITIONAL MDL TRANSFER IN ORDER FROM THE MDL PANEL (CTO-19) transferring this action from the United States District Court - that pursuant to 28 U.S.C. 1407, the actions listed on the attached schedule A and pending in the District of California, and the same hereby are, transferred to the Southern District of New York, with the consent of that court, assigned to the Honorable Judge Naomi Reice Buchwald, for coordinated or consolidated

		pretrial proceedings with the actions pending in that district and listed on Schedule A. (Signed by MDL Panel on 5/1/2014) (sjo) (Entered: 05/01/2014)
06/09/2014	566	CERTIFIED TRUE COPY OF CONDITIONAL MDL TRANSFER IN ORDER FROM THE MDL PANEL (CTO-20) transferring this action from the United States District Court - that pursuant to 28 U.S.C. 1407, the actions listed on the attached schedule A and pending in the District of New Jersey, and the same hereby are, transferred to the Southern District of New York, with the consent of that court, assigned to the Honorable Judge Naomi Reice Buchwald, for coordinated or consolidated pretrial proceedings with the actions pending in that district and listed on Schedule A. (Signed by MDL Panel on 6/6/2014) (sjo) (Entered: 06/09/2014)
06/23/2014	568	MEMORANDUM AND ORDER terminating (396) Motion for Reconsideration; denying (418) Motion for Reconsideration; terminating (428) Motion to Strike; denying (453) Motion to Dismiss; granting in part and

		denying in part (507) Motion to Dismiss; granting (516) Motion to Dismiss in case 1:11-md-02262-NRB. For the reasons stated above, exchange-based plaintiffs' motion for reconsideration of our ruling on trader- based claims is denied, but their motion for leave to amend their complaint is granted; defendants' motion to dismiss CEA claims on scienter grounds is denied; defendants' motion to dismiss CEA claims arising out of contracts purchased between May 30, 2008 and April 14, 2009 is granted; defendants' motion to dismiss OTC plaintiffs' contract and unjust enrichment claims is granted in part and denied in part; and defendant Societe Generale's motion to dismiss the exchange-based plaintiffs' complaint is granted. It has been nearly two years since defendants first moved to dismiss plaintiffs' consolidated amended complaints. Since then, this Court has issued three major opinions and the parties have submitted hundreds, if not thousands, of pages of briefing materials, all in an attempt to resolve the threshold question of any litigation: what claims, if any,

		have plaintiffs adequately pled? Now, at long last, there is clarity. OTC plaintiffs may state claims for breach of the implied covenant of good faith and fair dealing, and claims for unjust enrichment, but only against those defendant banks with which OTC plaintiffs transacted directly. Exchange-based plaintiffs may state claims under the CEA based on contracts purchased between April 15, 2009 and the end of the Class Period, based on a theory that defendants' alleged persistent suppression of LIBOR caused them damages; however, no such claim may lie against Societe Generale, as those claims are time barred. Exchange-based plaintiffs may also state claims against Barclays and Rabobank based on the alleged day-to-day, trader-based manipulation that occurred between January 1, 2005 and August 2007. This Memorandum and Order resolves docket entry nos. 396, 418, 428, 453, 507, and 516. (Signed by Judge Naomi Reice Buchwald on 6/23/2014) Filed In Associated Cases: 1:11-md-02262-NRB et al.

		***Docketed in all member and related cases pursuant to instructions from Chambers. (mro) Modified on 6/24/2014 (mro). (Entered: 06/23/2014)
07/02/2014	571	NOTICE: Within the next ten days, the Court will issue a communication addressing issues related to the next steps in this litigation and inviting submissions from the parties. Before receiving our communication, counsel are directed not to make any submissions to the Court. (Signed by Judge Naomi Reice Buchwald on 7/2/2014) Filed In Associated Cases: 1:11-md-02262-NRB et al. ***Docketed in all member and related cases pursuant to instructions from Chambers. (mro) (Entered: 07/03/2014)
07/18/2014	572	LETTER addressed to Counsel from Judge Naomi Reice Buchwald dated 7/17/2014 re: The issuance of our June 23, 2014 Memorandum and Order, which defines the contours of the complaints that we have considered to date, requires that we now address the next steps necessary to move this litigation forward. (tn) (Entered:

		07/18/2014)
08/05/2014	574	LETTER addressed to Judge Naomi Reice Buchwald from William C. Carmody dated 08-05-2014 re: Liaison Counsel. Document filed by City of New Britain Firefighters' and Police Benefit Fund, Mayor and City Council of Baltimore. (Attachments: # 1 Exhibit Claims Spreadsheet)(Carmody, William) (Entered: 08/05/2014)
08/13/2014	581	LETTER addressed to Judge Naomi Reice Buchwald from Harry S. Davis dated August 13, 2014 re: request for a pre-motion conference. Document filed by Tullett Prebon PLC.Filed In Associated Cases: 1:11-md-02262-NRB, 1:13-cv-06013-NRB, 1:13-cv-06014-NRB(Davis, Harry) (Entered: 08/13/2014)
08/13/2014	590	LETTER addressed to Judge Naomi Reice Buchwald from Joel Kurtzberg dated August 13, 2014 re: request leave to file a motion. Document filed by Credit Suisse Group AG. (Kurtzberg, Joel) (Entered: 08/13/2014)
08/13/2014	591	LETTER addressed to Judge Naomi Reice Buchwald from Fraser L. Hunter, Jr. dated August 13, 2014 re: Leave to

		move to dismiss. Document filed by RBS Citizens, N.A. (f/k/a Citizens Bank of Massachusetts), The Royal Bank of Scotland, Plc.Filed In Associated Cases: 1:11-md-02262-NRB, 1:13-cv-02343-NRB(Hunter, Fraser) (Entered: 08/13/2014)
08/13/2014	592	LETTER MOTION for Conference addressed to Judge Naomi Reice Buchwald from David E. Kovel, Christopher Lovell dated August 13, 2014. Document filed by 303030 Trading, LLC, Atlantic Trading USA, LLC, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH, 303030 Trading LLC, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C)Filed In Associated Cases: 1:11-md-02262-NRB, 1:11-cv-02613-NRB(Kovel, David) (Entered: 08/13/2014)
08/13/2014	593	LETTER addressed to Judge Naomi Reice Buchwald from Robert F. Wise, Jr. dated August 13, 2014 re: Pre-Motion Letters with respect to Claims in the

		Stayed Actions. Document filed by All Defendants. (Attachments: # 1 Appendix (Claim by Claim Master List of Actions))(Wise, Robert) (Entered: 08/13/2014)
08/13/2014	594	LETTER addressed to Judge Naomi Reice Buchwald from Robert F. Wise, Jr. dated August 13, 2014 re: Defendants' Proposed Motion to Dismiss. Document filed by All Defendants. (Wise, Robert) (Entered: 08/13/2014)
08/13/2014	595	JOINT LETTER addressed to Judge Naomi Reice Buchwald from Counsel for Defendants dated August 13, 2014 re: Plaintiffs' Fraud and Related Claims. Document filed by All Defendants. (Wise, Robert) (Entered: 08/13/2014)
08/13/2014	596	LETTER MOTION for Conference (Pre-Motion) to move to Dismiss Plaintiffs' Claims for Tortious Interference addressed to Judge Naomi Reice Buchwald from Marc J. Gottridge dated August 13, 2014. Document filed by All Defendants. (Wise, Robert) (Entered: 08/13/2014)
08/13/2014	597	LETTER addressed to Judge Naomi Reice Buchwald from Jonathan D. Schiller dated August 13, 2014 re: Dismissal of

		Plaintiffs' Consumer Protection Claims. Document filed by All Defendants. (Wise, Robert) (Entered: 08/13/2014)
08/13/2014	598	LETTER addressed to Judge Naomi Reice Buchwald from Fraser L. Hunter, Jr. dated August 13, 2014 re: Dismissal of Requests for Injunctive Relief. Document filed by All Defendants. (Wise, Robert) (Entered: 08/13/2014)
08/13/2014	599	LETTER addressed to Judge Naomi Reice Buchwald from Robert F. Wise, Jr. dated August 13, 2014 re: Federal and State Securities Law Claims in Schwab. Document filed by Bank of America Corporation, Bank of America, N.A., Bank of Tokyo-Mitsubishi UFJ Ltd., Barclays Bank PLC, Citibank, N.A., Citigroup, Inc., Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A., Credit Suisse Group AG, Deutsche Bank AG, HBOS PLC, HSBC Holdings PLC, JP Morgan Chase & Co., JPMorgan Chase Bank, National Association, Lloyds Banking Group PLC, Portigon AG, Royal Bank of Canada, The Norinchukin Bank, The Royal

		Bank of Scotland Group PLC, UBS AG, WestDeutsche Immobilienbank AG. (Wise, Robert) (Entered: 08/13/2014)
08/13/2014	600	LETTER addressed to Judge Naomi Reice Buchwald from Joel Kurtzberg dated August 13, 2014 re: Defendants' Anticipated Motion to Dismiss for Lack of Jurisdiction. Document filed by Credit Suisse (USA) Inc., Credit Suisse AG, Credit Suisse Group AG, Credit Suisse International, Credit Suisse Securities (USA) LLC. (Wise, Robert) (Entered: 08/13/2014)
08/14/2014	601	LETTER addressed to Judge Naomi Reice Buchwald from Joel Kurtzberg dated August 13, 2014 re: Defendants' Anticipated Motion to Dismiss for Lack of Jurisdiction. Document filed by BBA Enterprises, Ltd., BBA Libor, Ltd, Bank of America Corp., Bank of America, N.A., Barclays Bank PLC, Barclays Capital Inc., Barclays PLC, British Bankers' Association, Chase Bank USA, N.A., Citibank NA, Citigroup Financial Products, Inc., Citigroup Inc., Citiigroup Global Markets Inc., Cooperatieve Centrale Raiffeisen-

		Boerenleenbank B.A., Credit Argicole, S.A., Credit Suisse (USA) Inc., Credit Suisse AG, Credit Suisse Group AG, Credit Suisse International, Credit Suisse Securities (USA) LLC, Deutsche Bank AG, HBOS PLC, HSBC Bank PLC, HSBC Holding plc, ICAP plc, J.P. Morgan Bank Dublin PLC, JP Morgan Chase & Co., JPMorgan Chase Bank N.A., Lloyds Banking Group PLC, Royal Bank of Canada, Societe Generale, The Bank of Tokyo-Mitsubishi UFJ, Ltd., The Norinchukin Bank, The Royal Bank of Scotland Group plc, The Royal Bank of Scotland plc, UBS AG, UBS Limited, WestDeutsche Immobilienbank AG, The Hongkong and Shanghai Banking Corporation, Ltd., J.P. Morgan Markets Ltd., Lloyds Bank PLC (formerly known as Lloyds TSB Bank PLC), RBC Capital Markets, LLC, Portigon/WestLB AG. (Wise, Robert) (Entered: 08/14/2014)
08/14/2014	602	LETTER MOTION for Conference addressed to Judge Naomi Reice Buchwald from Joel Kurtzberg dated August 13, 2014. Document filed by Credit Suisse International. (Kurtzberg, Joel)

		(Entered: 08/14/2014)
08/20/2014	608	LETTER addressed to Judge Naomi Reice Buchwald from Kenneth E. Warner dated 08/20/2014 re: Amended Complaint and Defendants' pre-motion letters. Document filed by Federal National Mortgage Association. (Cruse, Samuel) (Entered: 08/20/2014)
08/20/2014	609	LETTER addressed to Judge Naomi Reice Buchwald from David R. Gelfand dated 8/20/2014 re: Response to the Exchange-Based Plaintiffs' ("Plaintiffs") letter dated August 13, 2014 ("August 13 Letter"). Document filed by Coperatieve Centrale Raiffeisen-Boerenleenbank B.A.. (Gelfand, David) (Entered: 08/20/2014)
08/20/2014	610	LETTER addressed to Judge Naomi Reice Buchwald from Richard J. Leverage dated 8/20/14 re: Previously Stayed Non-Class Action Cases. Document filed by The Federal Home Loan Mortgage Corporation, FDIC, as receiver. (Leveridge, Richard) (Entered: 08/20/2014)
08/20/2014	611	RESPONSE re: 592 LETTER MOTION for Conference addressed to Judge

		Naomi Reice Buchwald from David E. Kovel, Christopher Lovell dated August 13, 2014.. Document filed by HBOS PLC, Lloyds Banking Group PLC, Lloyds TSB Bank PLC. (Gottridge, Marc) (Entered: 08/20/2014)
08/20/2014	612	RESPONSE re: (593 in 1:11-md-02262-NRB) Letter,. Document filed by National Credit Union Administration Board. Filed In Associated Cases: 1:11-md-02262-NRB, 1:13-cv-07394-NRB(Shen, Andrew) (Entered: 08/20/2014)
08/20/2014	613	LETTER addressed to Judge Naomi Reice Buchwald from Stacey Slaughter dated August 20, 2014 re: Principal Plaintiffs' response to Defendants' August 13, 2014 pre motion letters. Document filed by PFI Bond & Mortgage Securities Fund, PFI Bond Market Index Fund, PFI Core Plus Bond I Fund, PFI Diversified Real Asset Fund, PFI Equity Income Fund, PFI Global Diversified Income Fund, PFI Government & High Quality Bond Fund, PFI High Yield Fund, PFI High Yield Fund I, PFI Income Fund, PFI Inflation Protection Fund, PFI Money

		Market Fund, PFI Preferred Securities Fund, PFI Short-Term Income Fund, PVC Asset Allocation Account, PVC Balanced Account, PVC Bond & Mortgage Securities Account, PVC Equity Income Account, PVC Government & High Quality Bond Account, PVC Income Account, PVC Money Market Account, PVC Short-Term Income Account, Principal Capital Interest Only I, LLC, Principal Commercial Funding II, LLC, Principal Commercial Funding, LLC, Principal Financial Group, Inc., Principal Financial Services, Inc., Principal Funds, Inc., Principal Life Insurance Company, Principal Real Estate Investors, LLC, Principal Variable Contracts Funds, Inc.. (Slaughter, Stacey) (Entered: 08/20/2014)
08/20/2014	614	LETTER addressed to Judge Naomi Reice Buchwald from David Preminger dated August 20, 2014 re: Defendants' Motions to Dismiss. Document filed by Triaxx Prime CDO 2006-1 ltd., Triaxx Prime CDO 2006-2 Ltd., Triaxx Prime CDO 2007-1 Ltd.. (Preminger, David) (Entered:

		08/20/2014)
08/20/2014	615	LETTER addressed to Judge Naomi Reice Buchwald from Richard J. Leveridge dated 8/20/2014 re: responses to Defendants' pre-motion letters [Dkt. Nos. 581, 589, 594, 595, 596, 600, 601, 602].. Document filed by The Federal Home Loan Mortgage Corporation, The Federal Deposit Insurance Corporation as Receiver, Direct Action Plaintiff. (Leveridge, Richard) (Entered: 08/20/2014)
08/20/2014	616	LETTER addressed to Judge Naomi Reice Buchwald from Richard J. Leveridge dated 8/20/2014 re: Response to Defendants' pre-motion letter regarding antitrust issues [Dkt. No. 594]. Document filed by The Federal Deposit Insurance Corporation as Receiver, The Federal Home Loan Mortgage Corporation. (Leveridge, Richard) (Entered: 08/20/2014)
08/20/2014	617	LETTER addressed to Judge Naomi Reice Buchwald from Richard J. Leveridge dated 8/20/2014 re: Response to Defendants' pre-motion letter regarding state law issues [Dkt. Nos. 589, 594, 595, 596, 602].

		Document filed by The Federal Deposit Insurance Corporation as Receiver, The Federal Home Loan Mortgage Corporation. (Leveridge, Richard) (Entered: 08/20/2014)
08/20/2014	618	LETTER addressed to Judge Naomi Reice Buchwald from Richard J. Leveridge dated 8/20/2014 re: Response to Defendants' pre-motion letters regarding personal jurisdiction [Dkt. Nos. 581, 600, 601]. Document filed by Direct Action Plaintiffs. (Leveridge, Richard) (Entered: 08/20/2014)
08/20/2014	619	LETTER addressed to Judge Naomi Reice Buchwald from Steven Fineman dated August 20, 2014 re: Response to Defendants' August 13, 2014 Letters Regarding Their Anticipated Motions to Dismiss. Document filed by Bay Area Toll Authority, Charles Schwab & Co., Inc., Charles Schwab Bank, N.A., Charles Schwab Corporation, Schwab Advisor Cash Reserves, Schwab Cash Reserves, Schwab Investor Money Fund, Schwab Money Market Fund, Schwab Retirement Advantage Money Fund, Schwab Short-Term Bond

		Market Fund, Schwab Total Bond Market Fund, Schwab U.S. Dollar Liquid Assets Fund, Schwab Value Advantage Money Fund, Schwab Yieldplus Fund, Schwab Yieldplus Fund Liquidation Trust. Filed In Associated Cases: 1:11-md-02262-NRB, 1:13-cv-07005-NRB, 1:14-cv-03094-NRB(Fineman, Steven) (Entered: 08/20/2014)
08/20/2014	620	LETTER addressed to Judge Naomi Reice Buchwald from David E. Kovel dated August 20, 2014 re: Response to Defendants' Pre-Motion Letters Regarding Personal Jurisdiction [Dkt. Nos. 600, 601]. Document filed by 303030 Trading, LLC, Atlantic Trading USA, LLC, FTC Futures Fund PCC Ltd, FTC Futures Fund SICAV, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH, 303030 Trading LLC, Gary Francis, Nathaniel Haynes, Metzler Investment GmbH.Filed In Associated Cases: 1:11-md-02262-NRB, 1:11-cv-02613-NRB(Kovel, David) (Entered: 08/20/2014)
08/20/2014	621	LETTER addressed to Judge Naomi Reice Buchwald from Daniel L. Brockett dated August

		20, 2014 re: Defendants' Pre-Motion Letters with respect to Claims in the Stayed Actions.. Document filed by The City of Philadelphia, The Pennsylvania Intergovernmental Cooperation Authority. (Brockett, Daniel) (Entered: 08/20/2014)
08/20/2014	622	LETTER addressed to Judge Naomi Reice Buchwald from Alexander Barnett dated 8/20/2014 re: Filed pursuant to the Court's letter of July 17, 2014 (Docket No. 572) and in response to the letters of Defendants filed on August 13, 2014. (Docket Nos. 593-598). Document filed by City of Richmond, City of Riverside, County of Sacramento, County of San Diego, County of San Mateo, County of Sonoma, East Bay Municipal Utility District, San Diego Association of Governments, San Mateo Couty Joint Powers Financing Authority, Successor Agency to the Richmond Community Redevelopment Agency, David E. Sundstrom, The Regents of the University of California, The Richmond Joint Powers Financing Authority, The Riverside Public Financing Authority, County of Mendocino,

		City of Houston. (Barnett, Alexander) (Entered: 08/20/2014)
08/20/2014	623	LETTER addressed to Judge Naomi Reice Buchwald from Daniel L. Brockett dated August 20, 2014 re: Defendants' Pre-Motion Letters with respect to Claims in the Stayed Actions. Document filed by Darby Financial Products. (Brockett, Daniel) (Entered: 08/20/2014)
08/20/2014	624	LETTER addressed to Judge Naomi Reice Buchwald from Daniel L. Brockett dated August 20, 2014 re: Defendants' Pre-Motion Letters with respect to Claims in the Stayed Actions. Document filed by PRUDENTIAL CORE TAXABLE MONEY MARKET FUND, PRUDENTIAL INVESTMENT PORTFOLIOS 2. (Brockett, Daniel) (Entered: 08/20/2014)
08/20/2014	625	LETTER addressed to Judge Naomi Reice Buchwald from Daniel L. Brockett dated August 20, 2014 re: Defendants' Pre-Motion Letters with respect to Claims in the Stayed Actions. Document filed by Salix Capital US Inc.. (Brockett, Daniel) (Entered: 08/20/2014)

08/20/2014	626	LETTER addressed to Judge Naomi Reice Buchwald from William Carmody dated 8/20/2014 re: Defendants August 13, 2014 Pre-Motion Letters Regarding the Previously Stayed Class Cases. Document filed by City of New Britain Firefighters' and Police Benefit Fund, Mayor and City Council of Baltimore. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Carmody, William) (Entered: 08/20/2014)
08/20/2014	627	LETTER addressed to Judge Naomi Reice Buchwald from William Carmody dated 8/20/2014 re: Defendants August 13, 2014 Pre-Motion Letters Regarding the OTC Case and Request to Amend to Add Parties. Document filed by City of New Britain Firefighters' and Police Benefit Fund, Mayor and City Council of Baltimore. (Attachments: # 1 Proposed LIBOR Third Consolidated Amended Complaint Part 1, # 2 Proposed LIBOR Third Consolidated Amended Complaint Part 2, # 3 Proposed LIBOR Third Consolidated Amended Complaint Part 3)(Carmody, William) (Entered:

		08/20/2014)

[Notice of Appeal. CA2 Docket No. 1; Sept. 17, 2013]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE LIBOR-BASED FINANCIAL INSTRUMENTS ANTITRUST LITIGATION	MDL No. 2262 Master Case 11-md-2262 (NRB)
THIS DOCUMENT RELATES TO: Case No. 12 CV 1025 (NRB)	ECF Case
ELLEN GELBOIM and LINDA ZACHER, individually for themselves and on behalf of all others similarly situated, Plaintiffs -against- CREDIT SUISSE GROUP AG, BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A., JP MORGAN CHASE & CO., JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, HSBC HOLDINGS PLC, HSBC BANK PLC, BARCLAYS BANK PLC, LLOYDS BANKING GROUP PLC, WESTLB AG, WESTDEUTSCHE IMMOBILIENBANK AG, UBS AG,	**NOTICE OF APPEAL**

THE ROYAL BANK OF SCOTLAND GROUP PLC, DEUTSCHE BANK AG, CITIBANK NA, CITIGROUP INC., COÖPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., THE NORINCHUKIN BANK, THE BANK OF TOKYO-MITSUBISHI UFJ, LTD., and ROYAL BANK OF CANADA,

Defendants

Notice is hereby given that Ellen Gelboim and Linda Zacher, plaintiffs in the above named action ("Bondholder Plaintiffs"), individually and on behalf of all others similarly situated, hereby appeal to the United States Court of Appeals for the Second Circuit from: (1) the March 29, 2013 Memorandum and Order dismissing all claims for relief asserted by Bondholder Plaintiffs, (2) each and every part of the final judgment[1] associated with the dismissal of all claims for relief asserted by Bondholder Plaintiffs, (3) all orders subsumed within said final judgment, and, (4) without limitation, (a) the August 23, 2013 Memorandum and Order denying Bondholder

[1] Bondholder Plaintiffs believe that such final judgment was entered on or about August 26, 2013 by operation of Federal Rule of Civil Procedure 58(c)(2)(B). Bondholder Plaintiffs hereby state their intention that this Notice of Appeal includes, without limitation, each and every part of the final judgment associated with the Court's dismissal of all claims for relief asserted by Bondholder Plaintiffs in the above-captioned proceedings, regardless of the manner and date of entry of judgment.

Plaintiffs' motion for leave to amend their complaint, and (b) the August 10, 2012 Order foreclosing Bondholder Plaintiffs' earlier proposed motion for leave to amend.

Dated: September 17, 2013

[First Amended Class Action Complaint. MDL Docket No. 144; Apr. 30, 2012]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE LIBOR-BASED FINANCIAL INSTRUMENTS ANTITRUST LITIGATION	MDL No. 2262
THIS DOCUMENT RELATES TO: Case No. 12 CV 1025 (NRB)	
ELLEN GELBOIM and LINDA ZACHER, individually for themselves and on behalf of all others similarly situated, Plaintiffs -against-	**FIRST AMENDED CLASS ACTION COMPLAINT**
CREDIT SUISSE GROUP AG, BANK OF AMERICA CORPORATION, BANK OF AMERICA, N.A., JP MORGAN CHASE & CO., JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, HSBC HOLDINGS PLC, HSBC BANK PLC, BARCLAYS BANK PLC, LLOYDS BANKING GROUP PLC, WESTLB AG, WESTDEUTSCHE IMMOBILIENBANK AG, UBS AG,	**JURY TRIAL DEMANDED** **ECF Case**

THE ROYAL BANK OF SCOTLAND GROUP PLC, DEUTSCHE BANK AG, CITIBANK NA, CITIGROUP INC., COÖPERATIEVE CENTRALE RAIFFEISEN-BOERENLEENBANK B.A., THE NORINCHUKIN BANK, THE BANK OF TOKYO-MITSUBISHI UFJ, LTD., and ROYAL BANK OF CANADA,

Defendants

1. Plaintiffs Ellen Gelboim and Linda Zacher ("Plaintiffs"), by their undersigned attorneys, bring this action against Defendants based on the Defendants' conspiracy to manipulate the London Interbank Offered Rate ("Libor") in violation of the Sherman Act, 15 U.S.C. § 1. Plaintiffs bring this action for themselves and on behalf of all others who owned (including beneficially in "street name") any U.S. dollar-denominated debt security (a) that was assigned a unique identification number by the CUSIP[1] system; (b) on which interest was payable at any time between August 2007 and May 2010 (the "Class Period"); and (c) where that interest was payable at a rate expressly linked to the U.S. Dollar Libor rate ("US$ LIBOR" or simply "LIBOR"[2]). These debt securities are collectively referred to herein as the

[1] "CUSIP" stands for Committee on Uniform Securities Identification Procedures.

[2] As used herein, "US$ LIBOR" or "LIBOR" refers to the U.S. Dollar Libor rate, whereas "Libor" refers to all Libor rates, generally.

"Relevant LIBOR-Based Debt Securities." Excluded from "Relevant LIBOR-Based Debt Securities" and the Class are debt securities issued by any Defendant as obligor.

2. Plaintiffs' claims are made on information and belief (except as to allegations specifically pertaining to themselves and their own actions, which are made on personal knowledge) based on the investigation conducted by and under the supervision of Plaintiffs' counsel. That investigation included reviewing and analyzing information concerning Defendants and LIBOR, which Plaintiffs (through their counsel) obtained from, among other sources: (i) analyses by consulting experts engaged by plaintiffs in these coordinated proceedings; (ii) publicly available press releases, news articles, and other media reports (whether disseminated in print or by electronic media); (iii) filings Defendants made to the United States Securities and Exchange Commission ("SEC"); (iv) court documents submitted in Libor-related proceedings in Canada, Singapore, and Japan; and (v) scholarly literature concerning the potential manipulation of LIBOR during the Class Period. Those sources collectively support Plaintiffs' allegations that Defendants collusively and systematically suppressed LIBOR during the Class Period, so that the interest rates on Relevant LIBOR-Based Debt Securities purchased during the Class Period were lower than they otherwise would have been absent Defendants' misconduct.

3. Except as alleged in this Complaint, neither Plaintiffs, other Class members, nor other members of the public have access to the underlying facts relating to Defendants' improper activities.

Rather, that information lies exclusively within the possession and control of Defendants and other insiders, which prevents Plaintiffs from further detailing Defendants' misconduct. Moreover, numerous pending government investigations—both domestically and abroad, including by the United States Department of Justice ("DOJ"), the Commodity Futures Trading Commission ("CFTC"), and the SEC—concerning potential LIBOR manipulation could yield information from Defendants' internal records or personnel that bears significantly on the Plaintiffs' claims. Indeed, as one news report observed in detailing U.S. regulators' ongoing investigation, "[i]nternal bank emails may prove to be key evidence . . . because of the difficulty in proving that banks reported borrowing costs for Libor at one rate and obtained funding at another."[3] Plaintiffs thus believe further evidentiary support for their allegations will come to light after a reasonable opportunity for discovery.

SUMMARY OF THE CLAIM

4. This case arises from the manipulation of LIBOR for the U.S. dollar[4]—the reference point for determining interest rates for trillions of dollars in financial instruments—by a cadre of prominent

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[3] David Enrich, Carrick Mollenkamp & Jean Eaglesham, "U.S. Libor Probe Includes BofA, Citi, UBS," *MarketWatch*, March 17, 2011.

[4] While the term "LIBOR" generally encompasses rates with respect to numerous currencies (which are separately referred to as, for example, US$ LIBOR or Yen-LIBOR), for convenience Plaintiffs use the term "LIBOR" to refer to US$ LIBOR.

financial institutions. Defendants perpetrated a scheme to depress LIBOR for two primary reasons. First, well aware that the interest rate a bank pays (or expects to pay) on its debt is widely, if not universally, viewed as embodying the market's assessment of the risk associated with the bank, Defendants understated their borrowing costs to the BBA (thereby suppressing LIBOR) to portray themselves as economically healthier than they actually were—of particular importance given investors' trepidation in light of the widespread market turmoil of the past few years. Indeed, in an April 10, 2008 report, analysts at Citigroup Global Markets Inc. (a subsidiary of Defendant Citigroup) posited the "liquidity crisis" had "created a situation where LIBOR at times no longer represents the level at which banks extend loans to others"; specifically, the analysts concluded LIBOR "may understate actual interbank lending costs by 20-30bp [basis points]."[5] Second, artificially suppressing LIBOR allowed Defendants to pay lower interest rates on LIBOR-based financial instruments that Defendants sold to investors during the Class Period.

5. Each business day, Thomson Reuters calculates LIBOR—a set of reference or benchmark interest rates priced to different ranges of maturity, from overnight to one year—on behalf of the British Bankers' Association ("BBA"), which first began setting LIBOR on January 1, 1986. As the BBA itself has acknowledged, it is not a regulatory body and has

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[5] Scott Peng, Chintan (Monty) Gandhi, & Alexander Tyo, "Special Topic: Is LIBOR Broken?", April 10, 2008 (published by Citigroup Global Markets Inc.)

no regulatory function.[6] Its activities are not overseen by any U.K. or foreign regulatory agency. It is governed by a board of member banks that meets four times each year. The board is composed of senior executives from twelve banks, including Barclays Bank plc, Citibank NA, Credit Suisse, Deutsche Bank AG, HSBC Bank plc, J.P. Morgan Europe Ltd., and the Royal Bank of Scotland plc.[7]

6. Each of the ten currencies for which daily Libor are reported is overseen by a separate LIBOR panel created by the BBA. During the Class Period, designated contributing panels ranged in size from eight banks for Australian dollar, Swedish krona, Danish krone, and New Zealand dollar panels to sixteen banks for U.S. dollar, pound sterling, Euro, and Japanese yen panels. There is substantial overlap in membership among the panels. For example, during the Class Period, nine of the sixteen banks that served on the U.S. dollar panel also served on the Japanese yen, Swiss franc and Euro LIBOR panels.[8] Similarly, thirteen banks participated on both the dollar and yen LIBOR panels[9] and eleven banks participated on both

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[6] http://www.bba.org.uk/blog/article/bba-repeats-commitment-to-bba-libor, last accessed on April 30, 2012

[7] http://www.bba.org.uk/about-us, last accessed on April 30, 2012.

[8] Those banks are Bank of Tokyo, Barclays, Citibank, Deutsche Bank, HSBC, JP Morgan, Lloyds, Rabobank, RBS, and UBS.

[9] Those banks are Bank of America, Bank of Tokyo, Barclays, Citibank, Deutsche Bank, HSBC, JP Morgan, Lloyds, Rabobank, RBS, Société Générale (beginning in 2009), UBS, and West.

the U.S. dollar and Swiss franc LIBOR panels.[10]

7. During most of the Class Period, the BBA calculated LIBOR based on the rates the 16 banks who sat on the US$ LIBOR panel ("Panel Banks") reported as their costs of borrowing.[11] Every day, the banks responded to the BBA's question: "At what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11 am?" [12] On its website, the

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[10] Those banks are Bank of Tokyo, Barclays, Citibank, Credit Suisse, Deutsche, Bank HSBC, JP Morgan, Lloyds, Rabobank, RBS, and UBS.

[11] On February 9, 2009, Société Générale replaced Defendant HBOS on the BBA's US$ LIBOR panel. In February 2011, in response to concerns about possible LIBOR manipulation, the BBA added four more banks to the panel. On August 1, 2011, Defendant West, at its request, was removed from the panel. As of December 2011, the US$ LIBOR panel consisted of 18 banks.

[12] The composition of the LIBOR panel is intended to reflect the constituency of the London interbank money market for U.S. Dollars. The LIBOR definition is amplified as follows:

a. The rate at which each bank submits must be formed from that bank's perception of its cost of unsecured funds in the London interbank market. This will be based on the cost of funds not covered by any governmental guarantee scheme.
b. Contributions must represent rates at which a bank would be offered funds in the London interbank market.
c. Contributions must be for the specific currency concerned and not the cost of producing the currency by borrowing in a different currency and obtaining the required currency via the foreign exchange markets.
d. The rates must be submitted by members of staff at a bank with primary responsibility for management of a bank's cash, rather than a bank's derivative book.

BBA explains "a bank will know what its credit and liquidity risk profile is from rates at which it has dealt and can construct a curve to predict accurately the correct rate for currencies or maturities in which it has not been active." The banks informed the BBA of their costs of borrowing funds at different maturity dates (e.g., one month, three months, six months). The BBA discarded the upper four and lower four quotes and set LIBOR by calculating the mean value of the remaining middle eight quotes, known as an "inter-quartile" methodology. Thomson Reuters then published LIBOR, also reporting the quotes on which the BBA based its LIBOR calculation.

8. LIBOR is "the primary benchmark for short term interest rates globally,"[13] and has occupied (and continues to occupy) a crucial role in the operation of financial markets. For example, market participants commonly set the interest rate on floating-rate notes as a spread against LIBOR (e.g., "LIBOR + [X] bps")[14] and use LIBOR as a basis to determine the correct rate of return on short-term fixed-rate notes (by comparing the offered rate to LIBOR). Additionally, the pricing and settlement of Eurodollar futures and options—the most actively traded interest-rate futures contracts on the Chicago

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e. The definition of "funds" is: unsecured interbank cash or cash raised through primary issuance of interbank Certificates of Deposit.

[13] http://www.bbalibor.com/bbalibor-explained/the-basics, last accessed on April 19, 2012.

[14] The term "bps" stands for basis points. 100 basis points equal 1%.

Mercantile Exchange—are based on the three-month LIBOR. LIBOR thus affects the pricing of trillions of dollars' worth of financial transactions, rendering it, in the BBA's own words, "the world's most important number."[15]

9. Accordingly, it is well-established among market participants that, as *The Wall Street Journal* has observed, confidence in LIBOR "matters, because the rate system plays a vital role in the economy."[16] Moreover, given the vast universe of financial instruments LIBOR impacts, "even a small manipulation" of the rate "could potentially distort capital allocations all over the world."[17]

10. Throughout the Class Period, Defendants betrayed investors' confidence in LIBOR, as these financial institutions conspired to, and did, manipulate LIBOR by underreporting to the BBA the actual interest rates at which the Defendants expected they could borrow funds—i.e., their true costs of borrowing—on a daily basis. The BBA then relied on

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[15] BBA press release, "BBA LIBOR: the world's most important number now tweets daily," May 21, 2009, available at http://www.bbalibor.com/news-releases/bba-libor-the-worlds-most-important-number-now-tweets-daily, last accessed on April 28, 2012.

[16] Carrick Mollenkamp and Mark Whitehouse, "Study Casts Doubt on Key Rate — WSJ Analysis Suggests Banks May Have Reported Flawed Interest Data for Libor," *The Wall Street Journal*, May 29, 2008.

[17] Rosa M. Abrantes-Metz and Albert D. Metz, "How Far Can Screens Go in Distinguishing Explicit from Tacit Collusion? New Evidence from the Libor Setting," *CPI Antitrust Chronicle*, March 2012.

the false information Defendants provided to set LIBOR. By acting together and in concert to knowingly understate their true borrowing costs, Defendants caused LIBOR to be set artificially low.

11. Defendants' manipulation of LIBOR allowed them to pay unduly low interest rates to lenders on LIBOR-based financial instruments outstanding during the Class Period. Investors—who until recently had no reason to suspect Defendants' knowing suppression of LIBOR—justifiably believed the financial instruments they were purchasing derived from a rate that was based on US$ LIBOR panel members' honest and reasonable assessments of their borrowing costs. To the contrary, Defendants—in the debt-instrument context, the borrowers—surreptitiously bilked investors—the lenders—of their rightful rates of return on their investments, reaping hundreds of millions, if not billions, of dollars in ill-gotten gains. Moreover, by understating their true borrowing costs, Defendants provided a false or misleading impression of their financial strength to investors and the rest of the market.

12. During the Class Period, Plaintiffs and Class members owned in excess of $500 billion of LIBOR-based instruments, which paid artificially low returns due to Defendants' suppression of LIBOR.

13. Plaintiffs now seek relief for the damages they and Class members have suffered as a result of Defendants' violations of Section 1 of the Sherman Act, 15 U.S.C. § 1.

14. Plaintiffs and the members of the Class suffered damages by, *inter alia*, receiving manipulated and artificially depressed amounts of interest on

Relevant LIBOR-Based Debt Securities they owned during the Class Period.

PARTIES

A. PLAINTIFFS

15. Plaintiff Ellen Gelboim ("Gelboim"), a resident of New York, New York, is the sole beneficiary of her Individual Retirement Account that during the Class Period owned a CUSIP number-bearing Relevant LIBOR-Based Debt Security issued by General Electric Capital Corporation and received artificially depressed amounts of interest on the security as the result of Defendants' unlawful conduct.

16. Plaintiff Linda Zacher, a resident of Bryn Mawr, Pennsylvania, is the sole beneficiary of her late husband's Individual Retirement Account that during the Class Period owned a CUSIP number-bearing Relevant LIBOR-Based Debt Security issued by the State of Israel and received artificially depressed amounts of interest on the security as the result of Defendants' unlawful conduct.

B. DEFENDANTS

17. Defendant Bank of America Corporation is a Delaware corporation headquartered in Charlotte, North Carolina. Defendant Bank of America, N.A. is a federally chartered national banking association headquartered in Charlotte, North Carolina and an indirect, wholly owned subsidiary of Defendant Bank of America Corporation. Defendant Bank of America Corporation and Bank of America, N.A. are hereinafter referred to collectively as "Bank of America." At all relevant times, Bank of America was a Panel Bank.

18. Defendant Barclays Bank plc ("Barclays") is a United Kingdom public limited company headquartered in London, England. At all relevant times, Barclays was a Panel Bank.

19. Defendant Citigroup Inc. is a Delaware corporation headquartered in New York, New York. Defendant Citibank NA is a federally chartered national banking association headquartered in New York, New York and a wholly owned subsidiary of Defendant Citigroup Inc. Defendant Citigroup Inc. and Defendant Citibank NA are hereinafter referred to collectively as "Citibank." At all relevant times, Citibank was a Panel Bank.

20. Defendant Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. ("Rabobank") is a financial services provider with its headquarters in Utrecht, the Netherlands. At all relevant times, Rabobank was a Panel Bank.

21. Defendant Credit Suisse Group AG ("Credit Suisse") is a Swiss company headquartered in offices in Zurich, Switzerland. At all relevant times, Credit Suisse was a Panel Bank.

22. Defendant Deutsche Bank AG ("Deutsche Bank") is a German financial services company headquartered in Frankfurt, Germany. At all relevant times, Deutsche Bank was a Panel Bank.

23. Defendant HSBC Holdings plc is a United Kingdom public limited company headquartered in London, England. Defendant HSBC Bank plc is a United Kingdom public limited company headquartered in London, England and a wholly owned subsidiary of Defendant HSBC Holdings plc. Defendant HSBC Holdings plc and Defendant HSBC

Bank plc are hereinafter referred to collectively as "HSBC." At all relevant times, HSBC was a Panel Bank.

24. Defendant JPMorgan Chase & Co. is a Delaware corporation headquartered in New York, New York. Defendant JPMorgan Chase Bank, National Association, is a federally chartered national banking association headquartered in New York, New York and a wholly owned subsidiary of Defendant J.P. Morgan Chase & Co. Defendant JPMorgan Chase & Co. and Defendant JPMorgan Chase Bank, National Association are hereinafter referred to collectively as "JPMorgan." At all relevant times, JPMorgan was a Panel Bank.

25. Defendant Lloyds Banking Group plc ("Lloyds") is a United Kingdom public limited company headquartered in London, England. Lloyds was formed in 2009 through the acquisition of HBOS plc ("HBOS") by Lloyds TSB Bank plc ("Lloyds TSB"). At all relevant times, HBOS, Lloyds TSB, or Lloyds was a Panel Bank.

26. Defendant Royal Bank of Canada ("RBC") is the largest financial institution in Canada, and is headquartered in Toronto, Canada. At all relevant times, RBC was a Panel Bank.

27. Defendant The Bank of Tokyo-Mitsubishi UFJ, Ltd. ("Bank of Tokyo") is a Japanese subsidiary of Mitsubishi UFJ Financial Group, Inc., and is headquartered in Tokyo, Japan. At all relevant times, Bank of Tokyo was a Panel Bank.

28. Defendant The Norinchukin Bank ("Norinchukin") is a Japanese cooperative bank headquartered in Tokyo, Japan. At all relevant times,

Norinchukin was a Panel Bank.

29. Defendant The Royal Bank of Scotland Group plc ("RBS") is a United Kingdom public limited company headquartered in Edinburgh, Scotland. At all relevant times, RBS was a Panel Bank.

30. Defendant UBS, AG ("UBS") is a Swiss company based in Basel and Zurich, Switzerland. At all relevant times, UBS was a Panel Bank.

31. Defendant WestLB AG is a German joint stock company headquartered in Dusseldorf, Germany. Defendant Westdeutsche ImmobilienBank AG is a German company headquartered in Mainz and wholly owned subsidiary of WestLB AG. Defendant WestLB AG and Defendant Westdeutsche ImmobilienBank AG are hereinafter referred to collectively as "West." At all relevant times, West was a Panel Bank.

32. Various other entities and individuals not named as defendants in this Complaint participated as co-conspirators in the acts complained of, and performed acts and made statements which were in furtherance of the unlawful conduct alleged herein.

JURISDICTION AND VENUE

33. This action arises under Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1, and Section 4 of the Clayton Act, 15 U.S.C. § 15.

34. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1337 and Section 4 of the Clayton Act.

35. Venue is proper in the Southern District of New York pursuant to Section 12 of the Clayton Act, 15 U.S.C. § 22, and 28 U.S.C. § 1391(b), (c), and (d). One or more of the Defendants reside, transact

business, are found, or have agents in the District, a substantial part of the events giving rise to Plaintiff's claims arose in the District, and a substantial portion of affected interstate trade and commerce described herein has been carried out in this District.

SUBSTANTIVE ALLEGATIONS

A. EURODOLLAR ANALYSIS SUPPORTS COLLUSION DURING THE CLASS PERIOD.

36. As demonstrated by the work of an independent consulting expert retained by counsel in these actions, analysis of the Eurodollar market strongly supports that the Defendants suppressed their LIBOR quotes and colluded to suppress reported LIBOR rates. Moreover, this analysis further supports that Defendants colluded to control the amount of suppression over the Class Period.

37. The U.S. Federal Reserve prepares and publishes Eurodollar deposit rates for banks (the "Federal Reserve Eurodollar Deposit Rate"). These Eurodollar deposit rates are analogous to LIBOR in that they reflect the rates at which banks in the London Eurodollar money market lend U.S. dollars to one another, just as LIBOR is intended to reflect rates at which panel banks in the London interbank market lend U.S. dollars to one another. The Federal Reserve obtains its data from Bloomberg and the ICAP brokerage company.[18] Bloomberg Eurodollar deposit rate is similar to BBA's LIBOR except that the

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[18] See http://federalreserve.gov/releases/h15/data.htm, footnote 8. Last visited on April 23, 2012.

sampling is not limited to the 16 banks chosen by BBA. ICAP is a large broker-dealer in London in Eurodollar deposits.[19] ICAP surveys its client banks and updates its Eurodollar deposit rates about 9:30 AM each morning.

38. While the Defendants could have access to the ICAP Eurodollar deposit rates prior to submitting their individual LIBOR quotes at 11:00 each day, they would not — absent collusion — have access to other bank LIBOR quotes, which are confidential until submitted. Thus, even within the context of a suppressed LIBOR, absent collusion, individual panel banks would not know what quote other panel banks intended to submit relative to the Federal Reserve Eurodollar Deposit Rate.

39. The consulting expert determined that because of the nature of the relationship between the Federal Reserve Eurodollar Deposit Rate and LIBOR (detailed below), it would be unusual even for one bank to submit a LIBOR bid below the Federal Reserve Eurodollar Deposit Rate. For all Defendants to submit bids below the Federal Reserve Eurodollar Deposit Rate would be extremely unusual, and strongly

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[19] 'ICAP is the world's leading voice and electronic interdealer broker and the source of global market information and commentary for professionals in the international financial markets. The Group is active in the wholesale markets in interest rates, credit, commodities, foreign exchange and equity derivatives. ICAP has an average daily transaction volume in excess of $1.5 trillion, more than 60% of which is electronic. ICAP plc was added to the FTSE 100 Index on 30 June 2006. For more information go to www.icap.com.'

supports evidence of collusion among the banks.

40. Economic and statistical analysis strongly supports the use of the Federal Reserve Eurodollar Deposit rate as a benchmark for measuring the validity of LIBOR as reported by the panel banks. To measure how well the Federal Reserve Eurodollar Deposit Rate and LIBOR move together, for the purposes of this analysis, the difference between the two rates, the "Spread," is calculated as follows: Spread = BBA LIBOR – Federal Reserve Eurodollar Deposit Rate.

41. Since both LIBOR and the Federal Reserve Eurodollar Deposit Rate measure the lending cost to banks of Eurodollar deposits, important market and financial fundamentals, such as day-to-day changes in monetary policy, market risk and interest rates, as well as risk factors facing the banks generally (collectively "Market Fundamentals"), should be reflected similarly on both variables, and therefore should not affect the Spread. The BBA's LIBOR panel is intended to reflect the Eurodollar deposit market in London. By focusing on the Spread, the model therefore should be able to factor out normal and expected co-movements in banks' LIBOR quotes that arise from changes in Market Fundamentals.

42. To analyze how well the Federal Reserve Eurodollar Deposit Rate captures changes in Market Fundamentals and absorbs variations in LIBOR that are driven by such fundamentals, consulting experts used regression analysis to measure the day-to-day changes in the Spread against changes in the T-Bill rate and the commercial paper rate. The evidence from these regressions strongly supports that day-to-

day changes in the Federal Reserve Eurodollar Deposit Rate effectively capture day-to-day movements in LIBOR caused by Market Fundamentals. Thus, once the Federal Reserve Eurodollar Deposit Rate is subtracted to arrive at the Spread, remaining movements in LIBOR reflected in the Spread would be unrelated to movements in Market Fundamentals.

43. Because Market Fundamentals are fully captured by the Spread, absent manipulation, the Spread should always be zero or close to zero. Thus, as more fully discussed below, negative Spreads provide a strong basis to conclude that the Defendants suppressed and colluded to artificially suppress LIBOR.[20]

44. Figures 1 and 2 show the relationship between LIBOR, the Federal Reserve Eurodollar Deposit Rate, and the Spread beginning in 2000 and ending in mid 2012. As can be seen, between January 5, 2000 and around August 7, 2007, Federal Reserve's Eurodollar Deposit Rate tracked LIBOR very closely and the Spread remained positive and very close to zero. This finding indicates that the Spread effectively captures shared risks of the banks sampled by BBA and by Bloomberg and ICAP. The validity of this finding is bolstered by the fact that the Spread

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[20] It is important to note that to the extent panel banks submitting LIBOR quotes submit suppressed rates to the BBA, and these suppressed rates are also considered by Bloomberg or ICAP, then the resultant Federal Reserve Eurodollar Deposit rate would also be understated by the same suppression. Consequently, the Spread computed above could even understate the true magnitude of the suppression.

remained very close to zero in the face of multiple major financial dislocations, including the bursting of the dot-com bubble in 2000, the terrorist attacks of September 2001, and the 2001 U.S. economic recession. Likewise, the unusual downward movements in the Spread starting in August 2007 strongly evidences that LIBOR was being manipulated and suppressed during this period.[21]

[FIGURE 1 OMITTED]

[FIGURE 2 OMITTED]

45. Figure 3 shows the Spread between 3-month maturity BBA LIBOR and the Federal Reserve Eurodollar Deposit rate (3-month maturity BBA LIBOR – Federal Reserve Eurodollar Deposit rate), from January 2006 through early April 2012.

[FIGURE 3 OMITTED]

46. The shorter period between January 3, 2006 and August 7, 2007 demonstrated above contains 393 trading days. In this sub-period, there were only 3 days when the Spread was negative. Furthermore, the magnitude of these negative Spreads were also very

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[21] The Spread only became consistently positive around the end of October 2011, just after the European Commission raided banks in connection with LIBOR.

small, equaling -0.9 basis point on June 14, 2006, -0.5 basis point on July 27, 2006 and -0.2 basis point on November 2, 2006.[22] This finding again strongly supports that the Federal Reserve Eurodollar Deposit Rate serves as a good benchmark to control for Market Fundamentals that determine LIBOR. The average magnitude of the Spread during this period equaled less than one basis point. This finding also strongly supports that the risks of the banks sampled by BBA and Bloomberg and ICAP were similar.

47. By August 2007, however, the Spread began to move into negative territory. During the early part of August 2007, the Federal Reserve Eurodollar Deposit Rate stayed around 5.36%. On August 8, the Federal Reserve Eurodollar Deposit Rate increased by 5 basis points to 5.41%, while BBA LIBOR did not keep pace. The Spread turned negative 3 basis points on August 8, 2007. The Spread remained mostly negative after August 7 so that by August 15, 2007, the trailing 10-day moving-average of the Spread also turned negative. By August 31, 2007, the Federal Reserve Eurodollar Deposit rate kept increasing to 5.78%, while LIBOR was lagging. The negative Spread on August 31 grew to -16 basis points.

48. The Spread remained negative over the next year. Between August 31, 2007 and September 15, 2008, the Spread remained negative on 234 of the 255 days, or 91.7% of the days. The magnitude of the negative Spread averaged about -12 basis points. During this approximately one year period, the

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[22] One basis point is one-hundredth of a percentage point.

negative Spread exceeded -25 basis points on 18 days.

49. A big shock to LIBOR (and the Spread) came just after Lehman Brothers filed for bankruptcy on September 15, 2008, leading to significantly increased concerns about the health of all banks. The increased concerns about the health of the banks were reflected in substantial increases in the Federal Reserve Eurodollar Deposit Rate. On September 15, 2008, the Federal Reserve Eurodollar Deposit Rate equaled 3.0%, increasing to 3.2%, 3.75%, and 5% on September 16, 17 and 18, respectively. By September 30, the Federal Reserve Eurodollar Deposit Rate doubled to 6%.

50. In spite of increased risks and worries about the banks after the Lehman bankruptcy filing, LIBOR did not keep pace with the Federal Reserve Eurodollar Deposit Rate during this period of heightened concerns, causing the Spread to become more negative. On September 16, 2008, the negative Spread nearly doubled to -32 basis points. The next day, on September 17, the negative Spread doubled again reaching -69 basis points. On September 18, the negative Spread more than doubled once again reaching -180 basis points. Finally, on September 30, 2008, the negative Spread reached -195 basis points.

51. Thus, between September 15, 2008 and September 30, 2008, the Federal Reserve Eurodollar Deposit Rate increased by 300 basis points to reflect increasing concerns about the banks, while LIBOR increased by less than one-half, or by 123 basis points during the same period. This diversion in the behavior of the two rates strongly supports the finding that the Defendants intensified their collusive suppression of

LIBOR, and did so to understate their borrowing costs in the face of increasing concerns about the health of the banks.

52. The Spread remained negative for more than one and a half years following the Lehman filing, until May 17, 2010. As concerns about banks' financial health eased, so did the magnitude of the suppression of LIBOR. As stated earlier, the Federal Reserve Eurodollar Deposit Rate reached 6% on September 30, 2008. With the easing of the financial crisis, the Federal Reserve Eurodollar Deposit Rate fell to 0.45% on May 17, 2010. The average suppression of the LIBOR rate between October 1, 2008 and May 17, 2010 equaled negative 38 basis points. The Spread finally turned positive for the first time during the post-Lehman period on May 17, 2010. Following this date, the Spread again became negative, with the magnitude of the Spread averaging around -10 basis points. The dramatic period of negative Spread during the Class Period, following years of uniform behavior between each individual Defendant Bank's LIBOR quote and the Federal Reserve Eurodollar Deposit Rate, is also graphically demonstrated by Figures 4 to 19 below on a bank by bank basis. Every Spread during the period August 8, 2007 to May 17, 2010 is statistically significant at the extremely high 99% confidence level.

[FIGURES 4 – 19 OMITTED]

53. As the following chart demonstrates, the average Spread for each of the individual Defendants was uniformly negative throughout the entire Class

Period, strongly supporting that each of these banks was suppressing its LIBOR quotes, and colluding to suppress reported LIBOR rates.

BANK NAME	Average Spread between August 8, 2007 through May 17, 2010
1. Bank of Tokyo	-25 basis points
2. Bank of America	-30 basis points
3. Barclays	-25 basis points
4. Citi	-32 basis points
5. Credit Suisse	-27 basis points
6. Deutsche Bank	-31 basis points
7. HBOS	-29 basis points
8. HSBC	-32 basis points
9. JP Morgan	-35 basis points
10. Lloyds	-30 basis points
11. Norinchukin	-25 basis points
12. RaboBank	-32 basis points
13. Royal Bank of Canada	-28 basis points
14. Royal Bank of Scotland	-26 basis points
15. UBS	-29 basis points
16. West	-35 basis points

54. Moreover, as set forth in the following chart, during the critical two week period following the

bankruptcy of Lehman Brothers, each of the Defendants dramatically increased its collusive suppression of LIBOR.

BANK NAME	Average Spread between September 16, 2008 and September 30, 2008
1. Bank of Tokyo	-120 basis points
2. Bank of America	-144 basis points
3. Barclays	-87 basis points
4. Citi	-142 basis points
5. Credit Suisse	-122 basis points
6. Deutsche Bank	-129 basis points
7. HBOS	-110 basis points
8. HSBC	-141 basis points
9. JP Morgan	-153 basis points
10. Lloyds	-146 basis points
11. Norinchukin	-126 basis points
12. RaboBank	-143 basis points
13. Royal Bank of Canada	-140 basis points
14. Royal Bank of Scotland	-140 basis points
15. UBS	-141 basis points
16. West	-138 basis points

55. Every Spread during the period from September 16, 2008 to September 30, 2008 is statistically significant at the extremely high 99% confidence level.

56. Plaintiffs' consulting expert finds the results reflected in these two tables to be powerful and statistically significant evidence of the Defendants' collusive suppression of LIBOR during the Class Period.

57. As detailed above, analysis based on well accepted statistical methodologies strongly supports that suppression of LIBOR occurred during the Class Period, accomplished through the collusive conduct of the Defendants. The sustained period during which the Federal Reserve Eurodollar Deposit – LIBOR Spread fell and remained starkly negative, as seen in Figure 2 above, accounting as it does for Market Fundamentals, is not plausibly achievable absent collusion among Defendants. The intensified suppression from September 16, 2008 to September 30, 2008 (following the Lehman bankruptcy), in defiance of economic expectations, provides further powerful support for the suppression of LIBOR achieved through collusion by the Defendants. Because no Defendant Bank – absent collusive conduct – could know what LIBOR quote another panel bank actually intended to submit prior to those numbers being made public after 11:00 in the morning, the fact that all Defendants submitted LIBOR quotes below the Federal Reserve Eurodollar Deposit Rate over the Class Period further strongly supports the participation of each Defendant Bank in the suppressive and collusive scheme.

B. PROBABILITY OF DEFAULT ANALYSIS SUPPORTS COLLUSION DURING THE CLASS PERIOD.

58. Assessing the likelihood that LIBOR was

suppressed during the Class Period, the Schwab Plaintiffs' expert consultants compared US$ LIBOR panel members' quotes from 2007 through 2008 to the daily default probability estimates for each of those banks—as determined, and updated daily for each maturity (term), by Kamakura Risk Information Services ("KRIS").[23] The study focused on identifying any periods of severe discrepancy between each bank's probabilities of default ("PDs") and the LIBOR quotes the bank submitted to the BBA.

59. The KRIS reduced-form model estimates each bank's default risk on a daily basis by analyzing each bank's equity and bond prices, accounting information, and general economic conditions, such as the level of interest rates, unemployment rates, inflation rates, etc. On its website, KRIS states it "provides a full term structure of default for both corporate and sovereign credit names based upon a multiple models approach" and its default probabilities "are updated daily and cover more than 29,000 companies in 36 countries."[24]

60. PD provides a measure of a bank's credit (default) risk exposure, essentially the likelihood that the bank will default within a specified time period. PD can be estimated using statistical models, whereas LIBOR is a rate of return required by investors lending short-term funds to the bank. A finding of a

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[23] KRIS did not have PDs for Defendants West, Rabobank, or Norinchukin, because those companies were not publicly traded. This PD analysis therefore does not include those banks.

[24] *See* http://www.kris-online.com/, last accessed on April 23, 2012.

statistically significant negative correlation coefficient between daily LIBOR quotes and PDs for a given bank over a given term period violates the fundamental relationship between risk and return that is the cornerstone of finance. That is, investors require a higher required rate of return as a premium for taking on additional risk exposure. This results in a positive relationship (correlation) between risk and return. An increase in the bank's PD indicates that the risk of default has increased, thereby causing investors to require a higher rate of return for loans to the bank—which should correspond with a higher LIBOR quote.

61. Accordingly, a finding of a statistically significant negative coefficient (of any size) between a bank's daily LIBOR quotes and its PDs shows that increases in PDs correspond with decreases in LIBOR quotes—which violates fundamental finance theory. This would indicate that banks are suppressing their LIBOR quotes to avoid revealing the higher rates that reflect their true (higher) probabilities of default. In other words, any finding of negative, statistically significant correlation coefficients between a bank's PDs and its LIBOR quotes suggests LIBOR suppression by the bank over the analysis period.

62. The magnitude of the correlation coefficient is impacted by the volatility of both PD and LIBOR for each bank during the time period. Thus, for example, if a bank has high volatility in its PDs, the absolute value of the correlation coefficient will tend to be lower (i.e., less negative) as compared to an identical bank with low PD volatility. However, both may be equally engaged in LIBOR suppression if their correlation coefficients are statistically significant and negative.

63. The Schwab Plaintiffs' consulting experts used the KRIS database to test whether, for the period under study, each bank's daily sealed LIBOR quote correlates with the bank's estimated PD that day for the same maturity term (provided by KRIS). For example, the consultants examined the correlation between Bank of America's sealed quote for three-month LIBOR on each date with the three-month PD for Bank of America, as provided by the KRIS database on that same day. As explained above, standard finance theory implies that a positive correlation between a bank's PD and its LIBOR quote should exist—i.e., as the bank's default risk (PD) increases, its borrowing rate (LIBOR quote) should increase, and *vice versa*. That is, using the above example, standard finance theory predicts a positive correlation between Bank of America's three-month PD and its three-month LIBOR quote. A finding of either a zero or negative correlation between a bank's PD and its LIBOR quote indicates the latter does not reflect the bank's default-risk probability, which evidences LIBOR suppression. A negative correlation means the two values have an inverse relationship; as one goes up, the other tends to go down. A statistically significant negative correlation between a bank's LIBOR quote and its PD is consistent with the bank's reducing its LIBOR quote in order to mask its higher risk exposure during a period of financial crisis, such as during the 2007-2008 period. By submitting an artificially low LIBOR quote, the bank sends a false signal that it is less risky than it truly is.

64. The Schwab Plaintiffs' consulting experts found suppression over the 2007-2008 period for one-month, three-month, six-month, and 12-month LIBOR.

65. The LIBOR quotes for all the reporting banks (except HSBC) during 2007 were *negatively correlated* with their daily updated PDs (for the same maturity term) to a statistically significant degree. For example, the correlation between Bank of America's daily LIBOR quotes and its daily PDs, for example, was negative and statistically significant at a very high level for the one-month, three-month, six-month and 12-month terms, i.e., between -0.5857 and -0.6093.[25] In other words, the data indicate that, contrary to fundamental finance theory, the higher a Panel Bank's PD was, the *lower* its LIBOR quote was.

66. Performing the same analysis with respect to the LIBOR panel banks' daily LIBOR quotes and PDs during 2008, the expert consultants found that for all of the banks, the submitted LIBOR quotes were negatively correlated with their PDs at the one-month and three-month maturities. Indeed, all of the banks were submitting unduly low LIBOR quotes at all maturities during the time period from August 9, 2007 until September 12, 2008, and, with only one exception, from September 15 through December 31, 2008, the period following the Lehman bankruptcy.

67. The following graphs illustrate the findings of this expert analysis—which demonstrates a striking negative correlation between US$ LIBOR panel banks' LIBOR quotes and PDs during 2007 and 2008, indicating they severely depressed LIBOR

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[25] Correlation coefficients range from a value of -1 to 1. A correlation coefficient of -0.50, for example, would imply that a 1% increase in PD would result in a 50-basis point decline in the bank's LIBOR quote.

during that time.

Graph 1

Correlation Coefficients
Between Each Bank's Daily LIBOR Bid and
Probability of Default (PD)
One-Month Term

[GRAPH 1 OMITTED]

(Note: PDs are estimated daily using the reduced form model of Kamakura Risk Information Services.)

Graph 2

Correlation Coefficients
Between Each Bank's Daily LIBOR Bid and
Probability of Default (PD)
Three-Month Term

[GRAPH 2 OMITTED]

(Note: PDs are estimated daily using the reduced form model of Kamakura Risk Information Services.)

Graph 3

Correlation Coefficients
Between Each Bank's Daily LIBOR Bid and
Probability of Default (PD)
Six-Month Term

[GRAPH 3 OMITTED]

(Note: PDs are estimated daily using the reduced form model of Kamakura Risk Information Services.)

Graph 4

Correlation Coefficients Between Each Bank's Daily LIBOR Bid and Probability of Default (PD) Twelve-Month Term

[GRAPH 4 OMITTED]

(Note: PDs are estimated daily using the reduced form model of Kamakura Risk Information Services.)

Graph 5

Correlation Coefficients Between Each Bank's Daily LIBOR Bid and Probability of Default (PD) 9 August 2007 – 12 September 2008 Period

[GRAPH 5 OMITTED]

(Note: PDs are estimated daily using the reduced form model of Kamakura Risk Information Services.)

Graph 6

Correlation Coefficients
Between Each Bank's Daily LIBOR Bid and
Probability of Default (PD)
15 September 2008 – 31 December 2008
Period

[GRAPH 6 OMITTED]

C. DEFENDANTS POSSESSED STRONG FINANCIAL MOTIVES TO SUPPRESS LIBOR.

68. Defendants each had substantial financial incentives to suppress LIBOR. First, Defendants were motivated, particularly given investors' serious concerns over the stability of the market in the wake of the financial crisis that emerged in 2007, to understate their borrowing costs—and thus the level of risk associated with the banks. Moreover, because no one bank would want to stand out as bearing a higher degree of risk than its fellow banks, each Defendant shared a powerful incentive to collude with the other Defendants to ensure it was not the "odd man out." Indeed, analysts at Citigroup Global Markets—a subsidiary of Defendant Citigroup—acknowledged in an April 10, 2008 report:

> [T]he most obvious explanation for LIBOR being set so low is the prevailing fear of being perceived as a weak hand in this fragile market environment. If a bank is not held to transact at its posted LIBOR level, there is little incentive for it to post a rate that is more

> reflective of real lending levels, let alone one higher than its competitors. Because all LIBOR postings are publicly disclosed, any bank posting a high LIBOR level runs the risk of being perceived as needing funding. With markets in such a fragile state, this kind of perception could have dangerous consequences.[26]

Strategists at entities affiliated with other Defendants likewise confirmed that banks suppressed LIBOR. Echoing the sentiment of the above analysts, William Porter, credit strategist at Defendant Credit Suisse, said in April 2008 that he believed the three-month LIBOR was 0.4 percentage points—or 40 basis points—below where it should be.[27] And the next month, Tim Bond, head of asset-allocation research of Barclays Capital—a subsidiary of Defendant Barclays—observed that banks routinely misstated borrowing costs to the BBA to avoid the perception that they faced difficulty raising funds as credit markets seized up.[28] Bond explained that when the Barclays treasurer resolved to "quote the right rates," Barclays faced "a series of media articles saying that we were having difficulty financing."

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[26] Scott Peng, Chintan (Monty) Gandhi, & Alexander Tyo, "Special Topic: Is LIBOR Broken?," April 10, 2008.

[27] Carrick Mollenkamp, "Libor Surges After Scrutiny Does, Too," *The Wall Street Journal*, April 18, 2008.

[28] Gavin Finch and Elliott Gotkine, "Libor Banks Misstated Rates, Bond at Barclays Says," *Bloomberg*, May 29, 2008.

69. Second, by artificially suppressing LIBOR, Defendants paid lower interest rates on LIBOR-based financial instruments they sold to investors during the Class Period. Illustrating Defendants' motive to artificially depress LIBOR, in 2009 Citibank reported it would make $936 million in net interest revenue if rates would fall by 25 bps per quarter over the next year and $1.935 billion if they fell 1% instantaneously. JPMorgan Chase likewise reported significant exposure to interest rates in 2009: The bank stated that if interest rates increased by 1%, it would lose over $500 million. HSBC and Lloyds also estimated they would earn hundreds of millions of additional dollars in 2008-2009 in response to lower interest rates and would lose comparable amounts in response to higher rates. These banks collectively earned billions in net interest revenues during the Class Period.

70. Defendants thus possessed reputational and financial incentives to manipulate LIBOR—which, as detailed below, they did.

D. EMPIRICAL ANALYSES BY ACADEMICS AND OTHER COMMENTATORS FURTHER INDICATE LIBOR SUPPRESSION OCCURRED.

71. In addition to the independent expert work detailed above, publicly available analyses by academics and other commentators likewise support Plaintiffs' allegations. While those studies used various comparative benchmarks and did not employ uniform methodologies, they collectively indicate LIBOR was artificially suppressed during the Class

Period.

1. **The discrepancy between Defendants' reported LIBOR quotes and their CDS spreads indicates the banks misrepresented their borrowing costs to the BBA.**

72. One economic indicator that Defendants suppressed LIBOR during the Class Period is the variance between their LIBOR quotes and their contemporaneous cost of buying default insurance—i.e., a credit-default swap ("CDS")—on debt they issued during that period. A CDS—"the most common form of credit derivative, *i.e.*, [a] contract which transfers credit risk from a protection buyer to a credit protection seller"[29]—constitutes an agreement by which one party, the protection buyer, seeks financial protection in the event of a default on an underlying credit instrument (typically a bond or loan). Typically, a CDS buyer makes a series of payments (often referred to as the CDS "fee" or "spread") to the CDS seller in exchange for a payment if the underlying credit instrument experiences an adverse credit event.

73. The spread serves as a measure of the perceived risk of default by the entity issuing the underlying bond or receiving the loan—the greater the risk of default the underlying bond or loan bears, the greater the CDS spread. In the case of a CDS for which the underlying instrument consists of an

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[29] *Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of N.Y.*, 375 F.3d 168, 171-72 (2d Cir. 2004) (alteration in original) (citation and internal quotation marks omitted).

interbank loan where a LIBOR panel bank is the borrower, the greater the perceived risk the panel bank will default on the loan, the higher the applicable CDS spread, as this higher spread represents the cost of insuring against the increased risk of a default on the underlying loan.

74. As one commentator has observed, "The cost of bank default insurance has generally been positively correlated with LIBOR. That is, in times when banks were thought to be healthy, both the cost of bank insurance and LIBOR decreased or remained low, but when banks were thought to be in poor condition, both increased."[30] During the Class Period, however, those historically-correlated indicia of banks' borrowing costs diverged significantly.

75. That discrepancy was detailed in a May 29, 2008 *Wall Street Journal* article reporting the results of a study it had commissioned. The *Journal*'s analysis indicated numerous banks had caused LIBOR, "which is supposed to reflect the average rate at which banks lend to each other," to "act as if the banking system was doing better than it was at critical junctures in the financial crisis."[31] The *Journal* found that beginning in January 2008, "the two measures began to diverge, with reported LIBOR rates failing to reflect rising default-insurance costs."

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[30] Justin Wong, "LIBOR Left in Limbo; A Call for More Reform," 13 *North Carolina Banking Institute* 365, 371 (2009) (footnotes omitted).

[31] *See* Carrick Mollenkamp and Mark Whitehouse, "Study Casts Doubt on Key Rate — WSJ Analysis Suggests Banks May Have Reported Flawed Interest Data for Libor."

76. The *Journal* observed that the widest gaps existed with respect to the LIBOR quotes of Defendants Citibank, West, JPMorgan, and UBS, as well as HBOS. According to the *Journal*'s analysis, Citibank's LIBOR rates differed the most from what the CDS market suggested the bank's borrowing cost was. On average, the rates at which Citibank reported it could borrow dollars for three months (i.e., its three-month LIBOR rates) were about 87 basis points *lower* than the rates calculated using CDS data. West, HBOS, JPMorgan, and UBS likewise exhibited significant LIBOR-CDS discrepancies—of 70, 57, 43, and 42 basis points, respectively—while Defendants Credit Suisse, Deutsche Bank, Barclays, HSBC, Lloyds, and RBS each exhibited discrepancies of about 30 basis points. The study's authors concluded "one possible explanation for this gap is that banks understated their borrowing rates."

77. Citing another example of suspicious conduct, the *Journal* observed that on the afternoon of March 10, 2008, investors in the CDS market were betting that West—hit especially hard by the credit crisis—was nearly twice as likely to renege on its debts as Credit Suisse, which was perceived to be in better shape, yet the next morning the two banks submitted identical LIBOR quotes.

78. Additionally, having compared the banks' LIBOR quotes to their actual costs of borrowing in the commercial-paper market, the *Journal* reported, for example, that in mid-April 2008, UBS paid 2.85% to borrow dollars for three months, but on April 16, 2008, the bank quoted a borrowing cost of 2.73% to the BBA.

79. The *Journal* further noted an uncanny

equivalence between the LIBOR panel banks' quotes: the three-month borrowing rates the banks reported remained within a range of only 0.06 of a percentage point, even though at the time their CDS insurance costs (premiums) varied far more widely, reflecting the market's differing views as to the banks' creditworthiness. According to Stanford University professor Darrell Duffie, with whom the authors of the *Journal* article consulted, the unity of the banks' LIBOR quotes was "far too similar to be believed."

80. David Juran, a statistics professor at Columbia University who reviewed the *Journal*'s methodology, similarly concluded that the *Journal's* calculations demonstrate "very convincingly" that reported LIBOR rates are lower, to a statistically significant degree, than what the market thinks they should be.

81. Calculating an alternate borrowing rate incorporating CDS spreads, the *Journal* estimated that underreporting of LIBOR had a $45 billion effect on the market, representing the amount borrowers (the banks) did not pay to lenders (investors in debt instruments issued by the banks) that they would otherwise have had to pay.

82. According to the *Journal*, three independent academics, including Professor Duffie, reviewed its methodology and findings, at the paper's request. All three deemed the *Journal*'s approach "reasonable."

83. Further economic analysis supports the correlation seen in the *Journal*'s report. A study by Connan Snider and Thomas Youle—of the economics departments at UCLA and the University of

Minnesota, respectively—released in April 2010 concluded LIBOR did not accurately reflect average bank borrowing costs, its "ostensible target."[32] Noting that "[i]n a competitive interbank lending market, banks' borrowing costs should be significantly related to their perceived credit risk," Snider and Youle posited that if LIBOR quotes "express true, competitively determined borrowing costs," they should "be related to measures of credit risks, such as the cost of default insurance." According to Snider and Youle's analysis, however, quotes provided by US$ LIBOR panel banks in fact deviated from their costs of borrowing as reflected in CDS spreads.

84. Comparing, for example, the 12-month US$ LIBOR quotes from Citigroup and Bank of Tokyo together with each bank's corresponding one-year senior CDS spreads, Snider and Youle observed (as illustrated in the graph below) "that while Citigroup has a substantially higher CDS spread than [Bank of Tokyo], it submits a slightly lower Libor quote." Accordingly, the authors explain, while the CDS spreads "suggest that the market perceives Citigroup as riskier than [Bank of Tokyo], as it is more expensive to insure against the event of Citigroup's default," the banks' LIBOR quotes "tell the opposite story."

[GRAPHIC OMITTED]

85. Snider and Youle further noted the level

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[32] Connan Snider and Thomas Youle, "Does the LIBOR reflect banks' borrowing costs?", April 2, 2010.

of Citigroup's CDS spreads relative to its LIBOR quotes was "puzzling." The authors explained, "Given that purchasing credit protection for a loan makes the loan risk free, one would expect [the] difference between the loan rate and the CDS spread to roughly equal the risk free rate. This corresponds to the idea that a loan's interest rate contains a credit premium, here measured by the CDS spread." But the authors observed that Citigroup's quote was often "significantly below its CDS spread," implying "there were interbank lenders willing to lend to Citigroup at rates which, after purchasing credit protection, would earn them *a guaranteed 5 percent loss*." (Emphasis added). That discrepancy contravenes basic rules of economics and finance, thus indicating Citibank underreported its borrowing costs to the BBA.

2. Cross-currency discrepancies in Defendants' LIBOR quotes indicate they suppressed LIBOR.

86. Defendants' LIBOR quotes also displayed inexplicable "cross-currency rank reversals." That is, as detailed in Snider and Youle's paper referenced above, at least some Defendants reported lower rates on LIBOR than did other panel members but, for other currencies, provided higher rates than did those same fellow banks. Both Bank of America and Bank of Tokyo, for instance, quoted rates for LIBOR and Yen-LIBOR during the period under study, yet Bank of America quoted a lower rate than Bank of Tokyo for LIBOR and a *higher* rate than Bank of Tokyo for Yen-LIBOR. Other Defendants included in Snider and Youle's analysis—Barclays, Citigroup, and JPMorgan—displayed similar anomalies across currencies, as the graphs below illustrate. Citigroup,

for example, often reported rates at the top of the Yen-LIBOR scale while simultaneously quoting rates at the bottom of the LIBOR scale.

[GRAPHIC OMITTED]

87. Snider and Youle explain that because "the same bank is participating in each currency," the credit risk "is the same for loans in either currency"; thus these "rank reversals" demonstrate that differences in the banks' LIBOR quotes "are not primarily due to differences in credit risk, something we would expect of their true borrowing costs." Cross-currency rank reversals are inconsistent with the notion that LIBOR quotes reflect each panel bank's singular "credit and liquidity risk profile."

3. The frequency with which at least certain Defendants' LIBOR quotes "bunched" around the fourth-lowest quote of the day suggests manipulation.

88. During the Class Period, the rates reported by certain Defendants—in particular, Citibank, Bank of America, and JPMorgan—also demonstrated suspicious "bunching" around the fourth lowest quote submitted by the 16 banks to the BBA. Indeed, Citibank's and Bank of America's quotes often tended to be identical to the fourth-lowest quote for the day. Because the LIBOR calculation involved excluding the lowest (and highest) four reported rates every day, bunching around the fourth-lowest rate suggests Defendants collectively depressed LIBOR by

reporting the lowest possible rates that would not be excluded from the calculation of LIBOR on a given day.

89. Bunching among Defendants' respective LIBOR quotes indicates the banks intended to report the same or similar rates, notwithstanding the banks' differing financial conditions, which, as detailed above, reasonably should have resulted in differing LIBOR quotes. Those discrepancies suggest Defendants colluded to suppress LIBOR.

90. The following charts show the frequency with which the LIBOR quotes submitted by Defendants Citigroup, Bank of America, and JPMorgan fell within a given percentage rate from the fourth-lowest quote. A negative difference means the reporting bank was below the fourth-lowest quote, and therefore its rate was not included in the daily LIBOR calculation, while zero difference means that the bank reported the fourth-lowest quote on a given day (either by itself or tied with other reporting banks).[33]

[GRAPHIC OMITTED]

91. According to Snider and Youle, the fact that observed bunching occurred around the pivotal fourth-lowest reported rate reflected the reporting banks' intention to ensure the lowest borrowing rates were included in the calculation of LIBOR (which

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[33] In the event of a tie between two or more banks, one of the banks' quotes, selected at random, was discarded.

includes only the fifth-lowest through the twelfth-lowest quotes).

92. In other words, banks that bunched their quotes around the fourth-lowest submission helped ensure the maximum downward manipulation of the resulting rate. Furthermore, that a panel bank reported one of the four lowest quotes (i.e., quotes excluded from the ultimate LIBOR calculation) does not mean the bank did not also participate in the collusion.

93. Further demonstrating the aberrant nature of the observed bunching around the fourth-lowest quote, Snider and Youle noted "the intraday distribution of *other* measures of bank borrowing costs do not exhibit this bunching pattern." (Emphasis added).

94. Additionally, Snider and Youle detailed a discrepancy between LIBOR panel banks' LIBOR quotes and their CDS spreads. The authors found that "with the intra-day variation of both Libor quotes and CDS spreads increasing from their historical levels," the CDS spreads' intra-day variation "grew considerably larger than that of Libor quotes."[34]

95. Snider and Youle further observed that—as the graphs below, embodying a composite of all the banks, illustrate—during the Class Period Defendants' quotes tended to "bunch" around the fourth-lowest quote much more commonly than those banks' CDS spreads "bunched" around the fourth-lowest spread.

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[34] Snider and Youle, "Does the LIBOR reflect banks' borrowing costs?"

The authors concluded, "If banks were truthfully quoting their costs, . . . we would expect these distributions to be similar."

[GRAPHIC OMITTED]

96. Given the method by which the BBA calculates LIBOR—discarding the highest and lowest reported rates and averaging the remainder—that strong concentration around the fourth-lowest rate is exactly what would occur if a number of banks sought in concert to depress LIBOR.

97. The Bank for International Settlements ("BIS"), a Swiss-based international organization that "serve[s] central banks in their pursuit of monetary and financial stability," similarly reported in a study of interbank lending rates that LIBOR quotes were artificially uniform during the second half of 2007. The BIS study cited LIBOR "market participants" who argued that "the rates quoted and paid by banks on their interbank borrowing tended to vary more than usual (and by more than what appears in the Libor panel) during the turbulence."

4. **That LIBOR diverged from its historical relationship with the Federal Reserve auction rate indicates suppression occurred.**

98. A comparison between LIBOR and the Federal Reserve auction rate further suggests Defendants artificially suppressed LIBOR during the Class Period. An April 16, 2008 *Wall Street Journal* article, for example, noted the Federal Reserve had

recently auctioned off $50 billion in one-month loans to banks for an average annualized interest rate of 2.82%—10 basis points higher than the comparable LIBOR rate. That differential would make no economic sense if the reported LIBOR rate was accurate, the *Journal* observed: "Because banks put up securities as collateral for the Fed loans, they should get them for a lower rate than Libor, which is riskier because it involves no collateral."

99. A subsequent *Journal* article raised further concerns about LIBOR's accuracy based on the comparison of one-month LIBOR with the rate for the 28-day Federal Reserve auction.[35] According to the *Journal*, because the Federal Reserve requires collateral:

> banks should be able to pay a lower interest rate [to the Fed] than they do when they borrow from each other [e.g., as ostensibly measured by LIBOR] because those loans are unsecured. It is the same reason why rates for a mortgage, which is secured by a house, are lower than those for credit cards, where the borrower doesn't put up any collateral. In other words, the rate for the Fed auction should be lower than Libor.

To the contrary, though, two days before the *Journal* article (September 22, 2008), the rate for the 28-day Fed facility was 3.75%—much higher than one-month LIBOR, which was

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[35] Carrick Mollenkamp, "Libor's Accuracy Becomes Issue Again," *The Wall Street Journal*, September 24, 2008.

3.18% that day[36] and 3.21% the next day.

5. LIBOR's divergence from its historical correlation to overnight index swaps also suggests it was artificially suppressed during the Class Period.

100. Yet another example of LIBOR's aberrant behavior with respect to other measures of banks' borrowing costs during the Class Period is its observed deviation from the overnight-index swap ("OIS") rate. In his academic article analyzing LIBOR data for the second half of 2007 and 2008, Justin Wong observed that between 2001 and July 2007, when the global credit crisis began, the spread between LIBOR and the OIS rate "averaged eleven basis points."[37] By July 2008, that gap "approached 100 basis points, a figure significantly higher than the spread from a year prior," and by October 2008, "it peaked at 366 basis points." While the spread "receded somewhat in November 2008 to 209 basis points," that was still "far above the pre-crisis level." Wong's analysis provides further support for Plaintiffs' allegations that Defendants suppressed LIBOR.

6. Additional data suggest LIBOR may have been manipulated as early as August 2006.

101. As the empirical evidence in support of

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[36] The *Journal* initially reported the one-month USD-LIBOR rate for that day as 3.19% but later noted the correct figure.

[37] Justin Wong, "LIBOR Left in Limbo; A Call for More Reform."

LIBOR manipulation continues to develop, at least some of the data point to possible manipulation as early as August 2006. In a recent paper, Rosa Abrantes-Metz (of NYU Stern School of Business's Global Economics Group) and Albert Metz (of Moody's Investors Service) compared one-month LIBOR against the Fed Funds effective rate and the one-month Treasury Bill ("T-Bill") rate.[38] Studying the period of early August 2006 through early August 2007, the authors observed the level of one-month LIBOR was "virtually constant," while the Fed Funds effective rate and the one-month T-Bill rate did "not present such striking stability." Spurred by that "highly anomalous" discrepancy, Abrantes-Metz and Metz examined the LIBOR panel members' individual quotes, which showed that during the studied period, the middle eight quotes used to set LIBOR each day were "essentially identical day in and day out"—another "highly anomalous" finding.

102. The authors concluded that "explicit collusion" presented "the most likely explanation" for this anomalous behavior. They explained that because LIBOR quotes are submitted sealed, "the likelihood of banks moving simultaneously to the same value from one day to the next without explicit coordination is extremely low, particularly given that their idiosyncrasies would not imply completely identical quotes under a non-cooperative outcome." They further opined "it is difficult to attribute it to tacit

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[38] Rosa M. Abrantes-Metz and Albert D. Metz, "How Far Can Screens Go in Distinguishing Explicit from Tacit Collusion? New Evidence from the Libor Setting."

collusion or strategic learning, since the change is abrupt, the quotes are submitted sealed, and the quotes themselves sometimes change from one day to the next in an identical fashion."

103. Abrantes-Metz and Sofia B. Villas-Boas (of UC-Berkeley's Department of Agricultural & Resource Economics) used another methodology—Benford second-digit reference distribution—to track the daily one-month LIBOR rate over the period 2005-2008.[39] Based on this analysis, the authors found that for sustained periods in 2006 and 2007, the empirical standard-deviation distribution differed significantly from the Benford reference distribution for nearly all banks submitting quotes. The authors also observed large deviations from Benford for a sustained period in 2008.

104. Those studies indicate at least a possibility that Defendants' suppression of LIBOR goes back even farther than August 2007.

7. Expert Analysis Performed In Connection With These Proceedings Indicates LIBOR's Increase Following Expressions of Concern Over LIBOR's Viability Resulted from Defendants' Reaction to Events Unrelated to Market Factors.

105. On April 17, 2008, the day after *The Wall Street Journal* initially reported on LIBOR's anomalous behavior and the BBA stated it would

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[39] Rosa M. Abrantes-Metz and Sofia B. Villas-Boas, "Tracking the Libor Rate," July 2010.

conduct an inquiry concerning LIBOR, there was a sudden jump in USD-LIBOR—the three-month borrowing rate hit 2.8175% that day, about eight basis points more than the previous day's rate of 2.735%.

106. Suspiciously, reported LIBOR rates for other currencies fell or remained relatively flat at the time USD-LIBOR rose, a sign that the latter was susceptible to manipulation.

107. A consulting expert engaged by other plaintiffs in these coordinated proceedings has conducted an analysis of the change in LIBOR on the single date of April 17, 2008. The analysis tested the hypothesis that if banks did not manipulate LIBOR, there would be no systematic changes in LIBOR expected on April 17, 2008 relative to typical changes on other days between January 5, 2000 to May 13, 2011, whereas if banks did manipulate LIBOR—and were responding to *The Wall Street Journal* article and BBA announcement—the reporting banks would be likely to reduce or abandon the manipulation immediately in response to these events. An immediate reduction in LIBOR manipulation would result in an increase in LIBOR quotes by the member banks on April 17, 2008.

108. To conduct the analysis, the consulting expert ran a regression using the daily changes in LIBOR. Table 1 below shows the studies' results. As discussed above, LIBOR increased on April 17, 2008 at a statistically significant level. Moreover, the increase in composite LIBOR as well as of the 11 of the 16 bank quotes were statistically significant. These findings were consistent with the hypothesis that the banks manipulated and suppressed LIBOR.

Table 1

Changes in LIBOR on April 17, 2008 in Percentage Points*

	Dependent variable	Average change during non-suppression days	Change in the dependent variable on April 17, 2008 relative to non-suppression days' average	Statistical Significance at the 1-5% level of the April 17, 2008 move
1	BBA LIBOR	-0.000371	0.0909*	5%
2	HSBC LIBOR	0.000154	0.1273**	1%
3	JPMC LIBOR	-0.000333	0.0872*	5%
4	BARCLAYS	-0.000333	0.1072*	5%

	LIBOR			
	WEST LB			
5	LIBOR	-0.000314	0.0971*	5%
	RBS			
6	LIBOR	-0.000352	0.0921*	5%
	RABOBANK			
7	LIBOR	-0.000364	0.0872*	5%
	CITI			
8	LIBOR	-0.000344	0.1022*	5%
	RBC			
9	LIBOR	0.002067	0.1021*	5%
	UBS			
10	LIBOR	-0.000777	0.1021*	5%
	NORIN			
11	LIBOR	-0.00038	0.0971*	5%
	HBOS			
12	LIBOR	0.002467	0.1111*	5%

Statistical significance is assessed using a AR(3) model for the residuals

* While not shown here, an additional dummy variable is used to control for changes during the Relevent Period of August 8, 2007 to May 17, 2010.

109. An alternative hypothesis is that, in addition to reacting to the Journal, other confounding effects that are related to the risk of the banking sector or overall Market Fundamentals could have emerged on April 16, 2008 and April 17, 2008. This alternative hypothesis also predicts an increase in LIBOR. To test this alternative hypothesis, instead of looking at daily changes in LIBOR quotes, it is possible to examine daily changes in the difference between banks' LIBOR quotes and the Federal Reserve Eurodollar Deposit Rate (the "Spread"). If risk-related factors or Market Fundamentals played a role, they would affect both the banks' LIBOR quotes as well as the Federal Reserve's Eurodollar Deposit Rate. Thus, if this hypothesis is correct, one should not see any changes to the Spread on April 17, 2008, since these two effects should cancel out. However, if there were no risk-related news and only a reaction to The Wall Street Journal article and the BBA announcement played a major role, then only LIBOR would be affected, leaving Federal Reserve's Eurodollar Deposit Rate mostly unaffected. In this case, the Spread would again be expected to increase.

110. The test of this alternative hypothesis showed that the Spreads of all 16 panel banks increased on April 17, 2008 and, as shown in Table 2 below, 11 of the 16 changes were statistically significant at levels ranging from 1% to 5%. Once again, these findings were consistent with the manipulation hypothesis and inconsistent with the hypothesis that other risk factors explained the April

17, 2008 shock to the LIBOR rate.

Table 2

Changes in Spread (BBA LIBOR – Federal Reserve's Eurodollar Deposit Rate) on April 17, 2008 in Percentage Points*

	Dependent variable	Average change in Spread during non-suppression days	Change in the dependent variable on April 17, 2008 relative to non-suppression days' average	Statistical Significance at the 1-5% level of the April 17, 2008 move
1	BBA LIBOR Spread	-0.000078	0.0838	5%
2	HSBC LIBOR Spread	0.000508	0.1205	1%
3	JPMC LIBOR Spread	-0.000103	0.0803*	5%

4	BARCLAYS LIBOR Spread	-0.000067	0.1002**	1%
5	RBS LIBOR Spread	-0.0001	0.0851*	5%
6	TOKYO LIBOR Spread	-0.000092	0.0797*	5%
7	CITI LIBOR Spread	-0.00012	0.0953*	5%
8	CS LIBOR Spread	-0.000224	0.07*	5%
9	RBC LIBOR Spread	-0.000135	0.0951*	5%
10	UBS LIBOR Spread	-0.000172	0.095*	5%
11	NORIN LIBOR Spread	-0.000179	0.0903**	1%

12	HBOS LIBOR Spread	0	0.1007*	5%

Statistical significance is assessed using a AR(3) model for the residuals

* While not shown here, an additional dummy variable is used to control for changes during the Relevent Period of August 8, 2007 to May 17, 2010.

111. The conclusions of this study are consistent with the contemporaneous views expressed by high-level employees of various Defendant panel banks recounted above.

E. THAT AT LEAST SOME DEFENDANTS FACED DIRE FINANCIAL CIRCUMSTANCES DURING THE CLASS PERIOD FURTHER RENDERS THEIR UNDULY LOW LIBOR QUOTES STRIKING.

112. The independent economic analyses performed in connection with these proceedings, whose findings are corroborated by the publicly available scholarly work detailed above, strongly indicate Defendants' LIBOR quotes during the Class Period did not appropriately reflect those banks' actual borrowing costs at that time—and, indeed, that Defendants *collectively* suppressed LIBOR. Further illustrating the striking discrepancy between Defendants' submissions to the BBA and their actual borrowing costs, during 2008 and 2009 at least some of those banks' LIBOR quotes were too low in light of the dire

financial circumstances the banks faced, which were described in numerous news articles from the Class Period.

1. **Citigroup**

113. On November 21, 2008, *The Wall Street Journal* reported that Citigroup executives "began weighing the possibility of auctioning off pieces of the financial giant or even selling the company outright" after the company faced a plunging stock price. The article noted Citigroup executives and directors "rushing to bolster the confidence of investors, clients and employees" in response to uncertainty about Citigroup's exposure to risk concerning mortgage-related holdings.[40] Similarly, on November 24, 2008, *CNNMoney* observed:

> If you combine opaque structured-finance products with current fair-value accounting rules, almost none of the big banks are solvent because that system equates solvency with asset liquidity. So at this moment Citi isn't solvent. Some argue that liquidity, not solvency, is the problem. But in the end it doesn't matter. Fear will drive illiquidity to such a point that Citi could be rendered insolvent under the current fair-value accounting system.[41]

114. On January 20, 2009, *Bloomberg* reported

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[40] *See* http://online.wsj.com/article/SB122722907151946371.html?mod=testMod

[41] *See* http://money.cnn.com/2008/11/21/news/companies/benner_citi.fortune/

that Citigroup "posted an $8.29 billion fourth-quarter loss, completing its worst year, and plans to split in two under Chief Executive Officer Vikram Pandit's plan to rebuild a capital base eroded by the credit crisis. The article further stated, "*The problems of Citi, Bank of America and others suggest the system is bankrupt.*" (Emphasis added).[42]

2. RBS, Lloyds, and HBOS

115. An April 23, 2008 analyst report from Société Générale reported, with respect to RBS's financial condition in the midst of its attempt to raise capital:

> Given the magnitude and change in direction in a mere eight weeks, we believe that management credibility has been tarnished. We also remain unconvinced that the capital being raised is in support of growth rather than merely to rebase and recapitalise a bank that overstretched itself at the wrong point in the cycle in its pursuit of an overpriced asset.
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> * * *
>
> [I]n our eyes, RBS has not presented a rock solid business case that warrants investor support and the bank has left itself almost no capital headroom to support further material deterioration in either its assets or its major operating environments. We believe £16bn (7% core tier I ratio) would have provided a solid

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[42] *See* http://www.bloomberg.com/apps/news?pid=21070001&sid=aS0yBnMR3USk

capital buffer.

The analysts also opined, "[W]e are not of the belief that all of RBS' problems are convincingly behind it." They further explained, "When faced with the facts and the events leading up to yesterday's request for a £12bn capital injection, we believe shareholders are being asked to invest further in order to address an expensive mishap in H2 07 rather than capitalise on growth opportunities."

116. On October 14, 2008, *Herald Scotland* reported a £37 billion injection of state capital into three leading banks, including RBS and HBOS. The article observed, "Without such near-nationalisations, . . . Royal Bank of Scotland and HBOS, would almost certainly have suffered a run on their remaining reserves and been plunged into insolvency. Their share prices could scarcely have taken much more of their recent hammering."[43]

117. On December 12, 2008, *Bloomberg* reported that shareholders approved HBOS's takeover by Lloyds TSB Group plc following bad-loan charges in 2008 rising to £5 billion and an increase in corporate delinquencies. The article also quoted analysts characterizing HBOS's loan portfolio as "'generally of a lower quality than its peers.'" *Bloomberg* further observed that HBOS suffered substantial losses on its bond investments, which totaled £2.2 billion, and losses on investments increased from £100 million to

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[43] *See* http://www.heraldscotland.com/reckless-banks-brought-this-financial-firestorm-down-upon-their-own-heads-1.891981.

£800 million for the year.[44]

116. A January 20, 2009 analyst report from Société Générale stated: "We would note that given the 67% drop in the share price following [RBS]'s announcements yesterday [relating to capital restructuring due to greater-than-expected credit-market related write downs and bad debt impairments in Q4], the loss of confidence in the bank's ability to continue to operate as a private sector player and concern over the potential ineffectiveness of the Asset Protection Scheme may prompt the UK government to fully nationalise the bank. In this instance, the shares could have very limited value, if at all."[45]

117. On March 9, 2009, *Bloomberg* reported that Lloyds "will cede control to the British Government in return for state guarantees covering £260 billion ($A572 billion of risky assets)." The article further observed that in September 2008, Lloyds agreed to buy HBOS for roughly £7.5 billion as the British Government sought to prevent HBOS from collapsing after credit markets froze. The HBOS loan book was described as "more toxic than anyone ever dreamed."[46]

118. On November 24, 2009, *Bloomberg* reported the Bank of England provided £62 billion ($102 billion) of "taxpayer-backed emergency

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[44] *See* http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a4BTqdgwhPTc&refer=uk.

[45] *See* January 20, 2009 Société Générale analyst report on Royal Bank of Scotland titled "Little value left for shareholders."

[46] *See* http://www.businessday.com.au/business/lloyds-the-latest-uk-bank-to-be-rescued-20090308-8sfd.html.

financing" to RBS and HBOS at the height of the financial crisis in October 2008 and that "[t]he [financing] operations were kept secret until now to prevent unnerving markets." The Bank's Deputy Governor Paul Tucker was quoted as stating in evidence to the Treasury Committee in London that "'[h]ad we not done it, the cycle would have been a lot worse...[and that] [t]his was tough stuff, a classic lender of last resort operation.'"[47]

3. West

119. A September 9, 2008 article in *Spiegel Online* reported West was "heavily hit as a result of the US sub-prime crisis and the resulting credit crunch. Ill-advised speculation resulted in a 2007 loss of €1.6 billion — leading the bank to the very brink of insolvency." The article reported that in early 2008, a special investment vehicle was set by West's primary shareholders to "guarantee €5 billion worth of risky investments." The European Commissioner approved the public guarantee but demanded that the bank be "completely restructured to avoid failing afoul of competition regulations." The European Commissioner for Competition later warned that if West did not significantly improve its restructuring package, Brussels would not approve the public assistance that European Union had already provided to the bank. Further, if that occurred, West would

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[47] *See* http://www.bloomberg.com/apps/news?pid=21070001&sid=a9MjQj6MNTeA

have to pay back €12 billion to the EU.[48]

120. On November 24, 2009, *Bloomberg* reported that BNP Paribas SA said "[i]nvestors should buy the euro [ ] on speculation that capital will need to be repatriated to support German bank WestLB AG." Furthermore, two German regional savings bank groups that hold a majority stake in West were "prepared to let the Dusseldorf-based lender become insolvent" and that "the prospect of insolvency may force state-owned banks and savings banks outside North Rhine-Westphalia, West's home state, to contribute to capital injections." Moreover, West needed "as much as 5 billion euros ($7.5 billion) in capital and may be shut by Nov. 30 unless a solution for its capital needs can be found."[49]

F. DEFENDANTS' IMPROPER ACTIVITIES HAVE INCITED NUMEROUS GOVERNMENTAL INVESTIGATIONS LEGAL PROCEEDINGS AND DISCIPLINARY ACTION WORLDWIDE.

121. As described in more detail below, investigations regarding LIBOR are ongoing in the

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[48] *See* Anne Seith, Germany's WestLB under Attack from Brussels, SPIEGEL ONLINE, Sept. 9, 2008, http://www.spiegel.de/international/business/0,1518,druck-577142,00.html.

[49] See Matthew Brown, BNP Says Buy Euro on Speculation WestLB to Be Rescued (Update 1), BLOOMBERG, Nov. 24, 2009, http://www.bloomberg.com/apps/news?pid=21070001&sid=aI9ZPZShrjWI.

United States, Switzerland, Japan, United Kingdom, Canada, the European Union, and Singapore by nine different governmental agencies, including the DOJ, the SEC, and the CFTC.

122. Indeed, on February 27, 2012, the DOJ represented to the Court overseeing these multidistrict proceedings that the Justice Department "is conducting a criminal investigation into alleged manipulation of certain benchmark interest rates, including LIBORs of several currencies." The investigation represents an unprecedented joint investigation by both the criminal and antitrust divisions of the DOJ.

123. Authorities are attempting to determine, among other things, "whether banks whose funding costs were rising as the financial crisis intensified tried to mask that trend by submitting artificially low readings of their daily borrowing costs."[50] Though the proceedings are ongoing, several Defendants have admitted that regulators—including the DOJ, SEC, and CFTC—have targeted them in seeking information about potential misconduct.

124. Moreover, documents submitted in connection with legal proceedings in Canada and Singapore reveal that at least certain Defendants underreported their borrowing costs to artificially suppress Yen-LIBOR.

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[50] David Enrich, Carrick Mollenkamp, & Jean Eaglesham, "U.S. Libor Probe Includes BofA, Citi, UBS." The Wall Street Journal, March 18, 2011

1. **News reports and Defendants' regulatory filings indicate U.S. government and foreign regulatory bodies are engaged in expansive investigations of possible LIBOR manipulation.**

125. The first public revelation regarding government investigations into possible LIBOR manipulation occurred on March 15, 2011, when UBS disclosed in a Form 20-F (annual report) filed with the SEC that the bank had "received subpoenas" from the SEC, the CFTC, and the DOJ "in connection with investigations regarding submissions to the [BBA]." UBS stated it understood "that the investigations focus on whether there were improper attempts by UBS, either acting on its own or together with others, to manipulate LIBOR rates at certain times." The bank further disclosed that it had "received an order to provide information to the Japan Financial Supervisory Agency concerning similar matters." UBS stated it was "conducting an internal review" and was "cooperating with the investigations."

126. On March 16, 2011, the *Financial Times* reported that UBS, Bank of America, Citigroup, and Barclays received subpoenas from U.S. regulators "probing the setting of" LIBOR "between 2006 and 2008." The *Times* further noted investigators had "demanded information from" West, and that the previous fall, "all 16 members of the committee that helped the [BBA] set the dollar Libor rate during 2006-

08 received informal requests for information."[51]

127. The same day, *MarketWatch* similarly reported "[m]ultiple U.S. and European banks, which provide borrowing costs to calculate Libor every day, have been contacted by investigators," including the DOJ, the SEC, and the CFTC.[52]

128. The next day, *Bloomberg* reported that Barclays and Citigroup had received subpoenas from U.S. regulators and that Defendants West, Lloyds, and Bank of America had been contacted by regulators. The article specified Bank of America had received subpoenas from the SEC and the DOJ.[53]

129. On March 23, 2011, *Bloomberg* revealed that Citigroup Inc., Deutsche Bank, Bank of America, and JPMorgan Chase were asked by U.S. regulators "to make employees available to testify as witnesses" in connection with the regulators' ongoing investigation.[54]

130. The next day, the *Financial Times* reported that Defendant Barclays was "emerging as a

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[51] Brooke Masters, Patrick Jenkins & Justin Baer, "Banks served subpoenas in Libor case," FT.com, available at http://www.ft.com/cms/s/0/52958d66-501f-11e0-9ad1-00144feab49a.html#axzz1sJNEDiiI, last accessed on April 17, 2012.

[52] Carrick Mollenkamp and David Enrich, "Banks Probed in Libor Manipulation Case," *MarketWatch*, March 16, 2011.

[53] Gavin Finch and Jon Menon, "Barclays, Citigroup Said to Be Subpoenaed in Libor Probe," *Bloomberg*, March 17, 2011.

[54] Joshua Gallu and Donal Griffin, "Libor Probe Spurs Witness Call-up at Citigroup, Deutsche Bank," *Bloomberg*, March 23, 2011.

key focus of the US and UK regulatory probe into alleged rigging of [LIBOR]." According to the *Times*, investigators were "probing whether communications between the bank's traders and its treasury arm," which helps set LIBOR, "violated 'Chinese wall' rules that prevent information-sharing between different parts of the bank." The *Times* further stated investigators were "said to be looking at whether there was any improper influence on Barclays' submissions" during 2006-2008 for the BBA's daily survey used to set LIBOR.[55]

131. Additional information regarding the regulatory probes emerged during the next few months, including revelations about other banks' possible—or actual—misconduct.

132. In an "Interim Management Statement" filed on April 27, 2011, for example, Barclays stated it was "cooperating with" the investigations by the UK Financial Services Authority, the CFTC, the SEC, and the DOJ "relating to certain past submissions made by Barclays to the [BBA], which sets LIBOR rates."

133. RBS similarly disclosed, in a Form 6-K filed with the SEC on May 6, 2011, the bank was "co-operating with" the investigations being conducted by the CFTC, the SEC, and the European Commission "into the submission of various LIBOR rates by relevant panel banks."

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[55] Brooke Masters and Megan Murphy, "Barclays at centre of Libor inquiry," FT.com, March 24, 2011, available at http://www.ft.com/intl/cms/s/0/1c3228f6-5646-11e0-82aa-00144feab49a.html#axzz1sJNEDIiI, last accessed on April 17, 2012.

134. Soon after, on May 16, 2011, Lloyds disclosed that it too "had received requests for information as part of the Libor investigation and that it was co-operating with regulators, including the [CFTC] and the European Commission."[56] Britain's *Daily Telegraph* further reported that HBOS, which merged with Lloyds TSB in January 2009 to form Lloyds Banking Group, "was the main target given its near collapse in late 2008 as it lost access to wholesale funding markets."

135. On May 23, 2011, the *Telegraph* reported that the Federal Bureau of Investigation ("FBI") was working with regulators in connection with the LIBOR investigations, and the FBI's British counterpart, the Serious Fraud Office, "revealed it is also taking an active interest."

136. In a Form 6-K filed with the SEC on July 26, 2011, UBS disclosed that it had "been granted conditional leniency or conditional immunity from authorities in certain jurisdictions, including the Antitrust Division of the DOJ, in connection with potential antitrust or competition law violations related to submissions for Yen LIBOR and Euroyen TIBOR (Tokyo Interbank Offered Rate)." Accordingly, the company continued, it would "not be subject to prosecutions, fines or other sanctions for antitrust or competition law violations in connection with the matters [UBS] reported to those authorities, subject to [UBS's] continuing cooperation." The conditional

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[56] Harry Wilson, "Lloyds Banking Group in Libor investigation," *The Daily Telegraph*, May 17, 2011.

leniency UBS received derives from the Antitrust Criminal Penalties Enhancement and Reform Act and the DOJ's Corporate Leniency Policy, under which the DOJ only grants leniency to corporations reporting *actual illegal activity*. UBS later disclosed (on February 7, 2012) that the Swiss Competition Commission had granted the bank conditional immunity regarding submissions for Yen LIBOR, TIBOR, and Swiss franc LIBOR.

137. Similar to the other Defendants discussed above, HSBC, in an interim report filed on August 1, 2011, disclosed that it and/or its subsidiaries had "received requests" from various regulators to provide information and were "cooperating with their enquiries."

138. On or about the same day, Barclays—which several months earlier had referenced its "cooperation" with governmental entities investigating potential misconduct relating to LIBOR—specified the investigations involved "submissions made by Barclays" and other LIBOR panel members. Barclays further stated it was engaged in discussions with those authorities about potential resolution of these matters before proceedings are brought against the bank.

139. On September 7, 2011, the *Financial Times* reported that as part of their LIBOR investigation, the DOJ and the CFTC—in assessing whether banks violated the Commodity Exchange Act, which can result in criminal liability—were examining "whether traders placed bets on future yen and dollar rates and colluded with bank treasury departments, who help set the Libor index, to move the rates in their direction," as well as "whether some banks lowballed

their Libor submissions to make themselves appear stronger."[57]

140. On October 19, 2011, *The Wall Street Journal* reported that the European Commission "seized documents from several major banks" the previous day, "marking the escalation of a worldwide law-enforcement probe" regarding the Euro Interbank Offered Rate, or Euribor—a benchmark, set by more than 40 banks, used to determine interest rates on trillions of euros' worth of euro-denominated loans and debt instruments. The Euribor inquiry, the *Journal* explained, constitutes "an offshoot" of the broader LIBOR investigation that had been ongoing for more than a year. According to the *Journal*, while the list of financial firms raided by the European Commission was not available, people familiar with the situation had counted "a large French bank and a large German bank" among the targets, and the coordinated raids "occurred in London and other European cities."

141. On October 31, 2011, the *Financial News* observed that "[a]n investigation into price fixing, first ordered by the [SEC] in 2008, focused on whether banks, including UBS, Citigroup, and Bank of America, had been quoting deliberately low rates."[58]

142. On December 9, 2011, *Law360* reported

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[57] Brooke Masters and Kara Scannell, "Libor inquiry looks at criminal angle," FT.com, September 7, 2011, available at http://www.ft.com/cms/s/0/c8ed4248-d962-11e0-b52f-00144feabdc0.html#axzz1sRxAdyPS, last accessed on April 18, 2012.

[58] Tom Osborn, "Is Libor in its death throes?", *Financial News*, October 31, 2011.

that the Japanese Securities and Exchange Surveillance Commission ("SESC") alleged that Citigroup Global Markets Japan Inc. and UBS Securities Japan Ltd. "employed staffers who attempted to influence" TIBOR "to gain advantage on derivative trades." The SESC recommended that the Japanese prime minister and the head of Japan's Financial Services Agency ("JFSA") take action against the companies. The Commission specified that Citigroup's head of G-10 rates and a Citigroup trader, as well as a UBS trader, were involved in the misconduct, further stating, "[t]he actions of Director A and Trader B are acknowledged to be seriously unjust and malicious, and could undermine the fairness of the markets." Moreover, the Commission added, "[i]n spite of recognizing these actions, the president and CEO . . . who was also responsible for the G-10 rates, overlooked these actions and the company did not take appropriate measures, therefore, the company's internal control system is acknowledged to have a serious problem."[59] *Law360* reported that the SESC released "a similar statement" about UBS's alleged conduct.

143. Citigroup and UBS did not deny the SESC's findings. A Citigroup spokesperson stated, "Citigroup Global Markets Japan takes the matter very seriously and sincerely apologizes to clients and all parties concerned for the issues that led to the recommendation. The company has started working diligently to address the issues raised." A UBS

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[59] Juan Carlos Rodriguez, "Japan Accuses Citi, UBS Of Market Trickery," *Law360*, December 9, 2011.

spokesperson similarly stated the bank was taking the findings "very seriously" and had been "working closely with" the SESC and the JFSA "to ensure all issues are fully addressed and resolved." She added, "We have taken appropriate personnel action against the employee involved in the conduct at issue."

144. Citigroup later disclosed that on December 16, 2011, the JFSA took administrative action against Citigroup Global Markets Japan, Inc. ("CGMJ") for, among other things, certain communications made by two CGMJ traders about the Euroyen Tokyo InterBank Offered Rate ("TIBOR"). The JFSA issued a business improvement order and suspended CGMJ's trading in derivatives related to Yen-LIBOR, as well as Euroyen and Yen-TIBOR from January 10 to January 23, 2012. On the same day, the JFSA also took administrative action against Citibank Japan Ltd. for conduct arising out of Citibank Japan's retail business and also noted that the communications made by the CGMJ traders to employees of Citibank Japan about Euroyen TIBOR had not been properly reported to Citibank Japan's management team.

145. UBS likewise recently revealed further details regarding the Japanese regulators' findings and the resulting disciplinary action. Specifically, the bank announced that on December 16, 2011, the JFSA commenced an administrative action against UBS Securities Japan Ltd. ("UBS Securities Japan") based on findings by the SESC that:

> (i) a trader of UBS Securities Japan engaged in inappropriate conduct relating to Euroyen TIBOR and Yen LIBOR, including approaching

> UBS AG, Tokyo Branch, and other banks to ask them to submit TIBOR rates taking into account requests from the trader for the purpose of benefiting trading positions; and (ii) serious problems in the internal controls of UBS Securities Japan resulted in its failure to detect this conduct.

Based on those findings, the JFSA "issued a Business Suspension Order requiring UBS Securities Japan to suspend trading in derivatives transactions related to Yen LIBOR and Euroyen TIBOR" from January 10 to January 16, 2012 (excluding transactions required to perform existing contracts). The JFSA also issued a "Business Improvement Order" requiring UBS Securities Japan to enhance "compliance with its legal and regulatory obligations" and to establish a "control framework" designed to prevent similar improper conduct.

146. Other news accounts in recent months have confirmed—based at least in part on information from people familiar with the ongoing investigations—that investigators are examining potential improper collusion by traders and bankers to manipulate LIBOR or other rates. On February 3, 2012, for instance, Credit Suisse disclosed that the Swiss Competition Commission commenced an investigation involving twelve banks and certain other financial intermediaries, including Credit Suisse, concerning alleged collusive behavior among traders to affect the bid-ask spread for derivatives tied to the LIBOR and TIBOR reference rates fixed with respect to certain currencies, and collusive agreements to influence these rates.

147. Additionally, on February 14, 2012, *Bloomberg* reported that two people with knowledge of the ongoing LIBOR probe said global regulators "have exposed flaws in banks' internal controls that may have allowed traders to manipulate interest rates around the world." The same people, who were not identified by name (as they were not authorized to speak publicly about those matters), stated investigators also had "received e-mail evidence of potential collusion" between firms setting LIBOR. Those sources further noted Britain's Financial Services Authority was "probing whether banks' proprietary-trading desks exploited information they had about the direction of Libor to trade interest-rate derivatives, potentially defrauding their firms' counterparties."[60]

148. *Bloomberg* further reported that RBS had "dismissed at least four employees in connection with the probes," and Citigroup and Deutsche Bank "also have dismissed, put on leave or suspended traders as part of the investigations."

149. *Bloomberg* also reported that European Union antitrust regulators are also investigating whether banks effectively formed a global cartel and coordinated how to report borrowing costs between 2006 and 2008.

150. In March 2012, the Monetary Authority of Singapore disclosed that it has been approached by

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[60] Lindsay Fortado and Joshua Gallu, "Libor Probe Said to Expose Collusion, Lack of Internal Controls," *Bloomberg*, February 14, 2012.

regulators in other countries to help in investigations over the possible manipulation of interbank interest rates.[61]

151. According to the *Daily Mail*, investigations by the SEC, Britain's Financial Services Authority, the Swiss Competition Commission, and regulators in Japan focus on three concerns: First, whether banks artificially suppressed LIBOR during the financial crisis, making banks appear more secure than they actually were; second, whether bankers setting LIBOR leaked their data to traders before officially submitting the banks' LIBOR quotes to the BBA; third, whether traders at the banks, and at other organizations (such as hedge funds), may have tried to influence LIBOR by making suggestions or demands on the bankers providing LIBOR quotes.

2. Evidence that Defendants manipulated Yen-LIBOR further demonstrates the plausibility of Plaintiffs' allegations that Defendants suppressed LIBOR.

a. Canadian Action

152. Brian Elliott, a Competition Law Officer in the Criminal Matters Branch of the Canadian Competition Bureau, submitted an affidavit in May 2011 (the "May 2011 Elliott Affidavit") in support of "an Ex Parte Application for Orders to Produce Records Pursuant to Section 11 of the Competition Act and for Sealing Orders" in the Court of Ontario, Superior Court of Justice, East Region. Specifically,

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[61] *Business Times*, March 9, 2012.

the May 2011 Elliott Affidavit sought orders requiring HSBC Bank Canada, Royal Bank of Scotland N.V., Canada Branch, Deutsche Bank, J.P. Morgan Bank Canada, and Citibank Canada (referenced collectively in the Affidavit as the "Participant Banks") to produce documents in connection with an inquiry concerning whether those banks conspired to "enhance unreasonably the price of interest rate derivatives from 2007 to March 11, 2010; to prevent or lessen, unduly, competition in the purchase, sale or supply of interest derivatives from 2007 to March 11, 2010; to restrain or injure competition unduly from 2007 to March 11, 2010; and to fix, maintain, increase or control the price for the supply of interest rate derivatives from March 12, 2010 to June 25, 2010."

153. The May 2011 Elliott Affidavit further states the Competition Bureau "became aware of this matter" after one of the banks (referenced in the affidavit as the "Cooperating Party") "approached the Bureau pursuant to the Immunity Program" and, in connection with that bank's application for immunity, its counsel "orally proffered information on the Alleged Offences" to officers of the Competition Bureau on numerous occasions in April and May 2011. Furthermore, according to the Affidavit, counsel for the Cooperating Party "stated that they have conducted an internal investigation of the Cooperating Party that included interviews of employees of the Cooperating Party who had knowledge of or participated in the conduct in question, as well as a review of relevant internal documents." The Affidavit also notes that on May 17, 2011, counsel for the Cooperating Party provided the Competition Bureau with "electronic records," which Elliot "believe[s] to be

records of some of the communications involving the Cooperating Party that were read out as part of the orally proffered information by counsel for the Cooperating Party."

154. The Affidavit recounted that, according to the Cooperating Party's counsel, the Participant Banks—at pertinent times "facilitated" by "Cash Brokers"—"entered into agreements to submit artificially high or artificially low London Inter-Bank Offered Rate ('LIBOR') submissions in order to impact the Yen LIBOR interest rates published by the [BBA]." Those entities engaged in that misconduct to "adjust[] the prices of financial instruments that use Yen LIBOR rates as a basis." The Affidavit further states the Cooperating Party's counsel "indicated the Participant Banks submitted rates consistent with the agreements and were able to move Yen LIBOR rates to the overall net benefit of the Participants."

155. More specifically, counsel proffered that the Participant Banks "communicated with each other and through the Cash Brokers to form agreements to fix the setting of Yen LIBOR," which "was done for the purpose of benefiting trading positions, held by the Participant Banks, on IRDs [interest rate derivatives]." By manipulating Yen LIBOR, the Affidavit continues, "the Participant Banks affected all IRDs that use Yen LIBOR as a basis for their price." The misconduct was carried out "through e-mails and Bloomberg instant messages between IRD traders at the Participant Banks and employees of Cash Brokers (who had influence in the setting of Yen LIBOR rates)." The Affidavit details:

> IRD traders at the Participant Banks

communicated with each other their desire to see a higher or lower Yen LIBOR to aid their trading position(s). These requests for changes in Yen LIBOR were often initiated by one trader and subsequently acknowledged by the trader to whom the communication was sent. The information provided by counsel for the Cooperating Party showed that the traders at Participant Banks would indicate their intention to, or that they had already done so, communicate internally to their colleagues who were involved in submitting rates for Yen LIBOR. The traders would then communicate to each other confirming that the agreed up rates were submitted. However, not all attempts to affect LIBOR submissions were successful.

The Cash Brokers were asked by IRD traders at the Participant Banks to use their influence with Yen LIBOR submitters to affect what rates were submitted by other Yen LIBOR panel banks, including the Participant Banks.

156. The Affidavit indicates the Cooperating Party's counsel further proffered that at least one of the Cooperating Party's IRD traders ("Trader A" or "Trader B") communicated with an IRD trader at HSBC, Deutsche Bank, RBS, JPMorgan (two traders), and Citibank. In that regard, the Affidavit specifies:

Trader A communicated his trading positions, his desire for a certain movement in Yen LIBOR and instructions for the HSBC trader to get HSBC to make Yen LIBOR submissions consistent with his wishes. Attempts through

the HSBC trader to influence Yen LIBOR were not always successful. Trader A also communicated his desire for a certain movement in the Yen LIBOR rate with the Cash Brokers. He instructed them to influence the Yen LIBOR submitters of HSBC. The Cash Brokers acknowledged making these attempts.

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Trader A communicated his trading positions, his desire for certain movement in Yen LIBOR and asked for the Deutsche IRD trader's assistance to get Deutsche to make Yen LIBOR submissions consistent with his wishes. The Deutsche IRD trader also shared his trading positions with Trader A. The Deutsche IRD trader acknowledged these requests. Trader A also aligned his trading positions with the Deutsche IRD trader to align their interests in respect of Yen LIBOR. The Deutsche IRD trader communicated with Trader A considerably during the period of time, mentioned previously, when Trader A told a Cash Broker of a plan involving the Cooperating Party, HSBC and Deutsche to change Yen LIBOR in a staggered and coordinated fashion by the Cooperating Party, HSBC and Deutsche. Not all attempts to change the LIBOR rate were successful.

* * *

Trader A explained to RBS IRD trader who his collusive contacts were and how he had and was going to manipulate Yen LIBOR. Trader

A also communicated his trading positions, his desire for certain movement in Yen LIBOR and gave instructions for the RBS IRD trader to get RBS to make Yen LIBOR submissions consistent with Trader A's wishes. The RBS IRD trader acknowledged these communications and confirmed that he would follow through. Trader A and the RBS IRD trader also entered into transactions that aligned their trading interest in regards to Yen LIBOR. Trader A also communicated to another RBS IRD trader his trading positions, his desire for a certain movement in Yen LIBOR and instructions to get RBS to make Yen LIBOR submissions consistent with his wishes. The second RBS IRD trader agreed to do this.

* * *

Trader A communicated his trading positions, his desire for a certain movement in Yen LIBOR and gave instructions for them [two JPM IRD traders] to get JPMorgan to make Yen LIBOR submissions consistent with his wishes. Trader A also asked if the IRD traders at JPMorgan required certain Yen LIBOR submissions to aid their trading positions. The JPMorgan IRD traders acknowledged these requests and said that they would act on them. On another occasion, one of the JPMorgan IRD traders asked Trader A for a certain Yen LIBOR submission, which Trader A agreed to help with. Trader A admitted to an IRD trader at RBS that he colluded with IRD traders at JPMorgan.

* * *

> Trader B of the Cooperating Party communicated with an IRD trader at Citi. They discussed their trading positions, advanced knowledge of Yen LIBOR submissions by their banks and others, and aligned their trading positions. They also acknowledged efforts to get their banks to submit the rates they wanted.

157. On May 18, 2011, the Ontario Superior Court signed the orders directing the production of the records sought by the May 2011 Elliott Affidavit. But to Plaintiffs" knowledge, the Affidavit was not publicly available until February 2012.

158. Elliott submitted another affidavit in June 2011 (the "June 2011 Elliott Affidavit"), which sought an order requiring ICAP Capital Markets (Canada) Inc., believed to be one of the "Cash Brokers" referenced in the May 2011 Elliott Affidavit, to "produce records in the possession of its affiliates, ICAP PLC and ICAP New Zealand Ltd." The June 2011 Elliott Affidavit primarily detailed communications between "Trader A" (an IRD trader) of the previously-referenced "Cooperating Party" and an ICAP broker (referenced in the June 2011 Elliott Affidavit as "Broker X") during the Class Period.

159. The Affidavit specifies that Trader A "discussed his current trading positions with Broker X and where he would like to see various maturities of Yen LIBOR move." Trader A "asked Broker X for Yen LIBOR submissions that were advantageous to Trader A's trading positions," and Broker X, in turn, "acknowledged these requests and advised Trader A

about his efforts to make them happen." The Affidavit further states:

> Counsel for the Cooperating Party has proffered that the expectation was for Broker X, directly or through other brokers at ICAP, to influence the Yen LIBOR submissions of Panel Banks. Broker X communicated to Trader A his efforts to get brokers at ICAP in London to influence Yen LIBOR Panel Banks in line with Trader A's requests. The efforts of Broker X included contacting a broker at ICAP in London who issued daily LIBOR expectations to the market. Trader A also communicated to Broker X his dealings with traders at other Participant Banks and a broker at another Cash Broker. Not all efforts to influence Yen LIBOR panel banks were successful. Broker X had additional discussions around the setting of Yen LIBOR with another trader of the Cooperating Party ("Trader B").

160. On June 14, 2011, the Ontario Superior Court issued an order allowing the document requests concerning ICAP.

161. The press has reported that UBS was the "Cooperating Party" referred to in the Elliott Affidavits.

b. Singapore Proceedings

162. In a pending legal action in Singapore's High Court, Tan Chi Min, former head of delta trading for RBS's global banking and markets division in Singapore (who worked for RBS from August 12, 2006 to November 9, 2011), alleges in his Writ of Summons

and Statement of Claim that the bank condoned collusion between its traders and LIBOR rate-setters to set LIBOR at levels to maximize profits. In the same filing, Tan stated RBS commenced an internal probe following inquiries by European and U.S. authorities about potential LIBOR manipulation.

163. Tan—whom RBS terminated, asserting he engaged in "gross misconduct"—alleges that RBS's internal investigations "were intended to create the impression that such conduct was the conduct not of the defendant itself but the conduct of specific employees who the defendant has sought to make scapegoats through summary dismissals." Tan further alleges that it was "part of his responsibilities to provide input and submit requests to the rate setter and there is no regulation, policy, guideline or law that he has infringed in doing this," and that "it was common practice among [RBS]'s senior employees to make requests to [RBS]'s rate setters as to the appropriate LIBOR rate." Those requests, Tan specified, "were made by, among others, Neil Danziger, Jezri Mohideen (a senior manager), Robert Brennan (a senior manager), Kevin Liddy (a senior manager) and Jeremy Martin," and the practice "was known to other members of [RBS]'s senior management including Scott Nygaard, Todd Morakis and Lee Knight." Tan added that RBS employees "also took requests from clients (such as Brevan Howard) in relation to the fixing of LIBOR."

164. Indeed, in responding to Tan's allegations, RBS admitted he had tried to improperly influence RBS rate-setters from 2007 to 2011 to submit LIBOR rates at levels that would benefit him.

165. In his complaint, however, Tan alleged that he could not have influenced the rate on his own. He also stated it was "common practice" among RBS's senior employees to make requests as to the appropriate LIBOR rate.

DEFENDANTS' UNDERWRITING OF RELEVANT LIBOR-BASED DEBT SECURITIES DURING THE CLASS PERIOD

166. One or more of Defendants, exclusively or with others, directly or through affiliated corporate entities, acted as underwriters of Relevant LIBOR-Based Debt Securities. In their role as underwriters, such Defendants were responsible for, *inter alia*, initially purchasing the debt securities from their respective issuers, and then re-selling the securities in private or public transactions.

167. As underwriters of Relevant LIBOR-Based Debt Securities, Defendants were intimately familiar with all major terms and conditions of the Relevant LIBOR-Based Debt Securities, including the fact that the interest rates to be paid on the securities were directly tied to the LIBOR rate.

INTERSTATE COMMERCE AND ANTITRUST INJURY TO PLAINTIFF AND THE CLASS

168. An essential component in the pricing of debt transactions is the interest rate to be paid.

169. At all relevant times, LIBOR was a key benchmark for determining the applicable interest rate, and hence the pricing, of many debt transactions in the United States.

170. Many hundreds of billions of dollars or more of debt transactions are entered into each year in

interstate commerce in the United States.

171. During the Class Period, there were outstanding more than 5,200 Relevant LIBOR-Based Debt Securities issued in the United States by corporate, state and municipal, and foreign sovereign issuers with an outstanding face value as January 1, 2008 of in excess of $500 Billion.

172. Hundreds of millions of dollars of interest, determined by reference to LIBOR as the benchmark, are paid each year in interstate commerce in the United States.

173. By suppressing LIBOR rates, Defendants effectively reduced the amount of interest paid each year on debt obligations in interstate commerce in the United States.

174. Thus, Defendants' unlawful conduct had a direct, substantial, and foreseeable impact on interstate commerce in the United States.

175. At all relevant times, Defendants knew that LIBOR was and is a key benchmark for determining the applicable interest rate of debt securities and other obligations in the United States and that, by suppressing LIBOR rates, Defendants would effectively reduce the amount of interest paid on such debt securities and obligations in the United States.

176. Indeed, both before and during the Class Period, some of Defendants directly or indirectly through affiliated entities underwrote millions of dollars' worth of Relevant LIBOR-Based Debt Securities, knowing that such securities had been or would be sold in interstate commerce in the United

States and that the interest payments thereunder would be made in interstate commerce.

177. By conspiring to suppress the LIBOR rates, Defendants intentionally targeted their unlawful conduct to affect commerce, including interstate commerce, within the United States.

178. Defendants' unlawful conduct had a direct and adverse impact on competition in the United States in that, absent Defendants' collusion, LIBOR rates would have been higher, more money would have been paid as interest in U.S. interstate commerce, and Plaintiffs and the members of the Class would have earned more interest.

179. As a direct result of Defendants' unlawful conduct, Plaintiffs and the Class have suffered injury to their business or property.

PLAINTIFFS DID NOT KNOW, NOR COULD THEY REASONABLY HAVE KNOWN, ABOUT DEFENDANTS' UNLAWFUL CONDUCT UNTIL AT LEAST MARCH 2011

180. Before UBS's March 15, 2011 announcement that it had been subpoenaed in connection with the U.S. government's investigation into possible LIBOR manipulation, Plaintiffs had not discovered, and could not with reasonable diligence have discovered, facts indicating Defendants were engaging in misconduct that caused LIBOR to be artificially depressed during the Class Period.

181. Moreover, though some market participants voiced concerns in late 2007-early 2008 that LIBOR did not reflect banks' true borrowing costs, those concerns were quickly—though, it now

turns out, wrongly—dismissed.

A. DEFENDANTS' UNLAWFUL ACTIVITIES WERE INHERENTLY SELF-CONCEALING.

182. Defendants conspired to share information regarding their LIBOR quotes and to misrepresent their borrowing costs to the BBA. In so doing, Defendants aimed to—and did—depress LIBOR to artificially low levels, which allowed them to pay unduly low interest rates on LIBOR-based financial instruments they or others issued or sold to investors.

183. Defendants' misconduct was, by its very nature, self-concealing. Defendants could not expect to suppress LIBOR if the BBA, or the general public, knew that they were colluding to report artificial, depressed borrowing rates. Defendants' conspiracy could only succeed by preventing the public from knowing what they were doing.

184. In addition, the facts surrounding the Defendants' operations were internal to them. First, those banks' actual or reasonably expected costs of borrowing were not publicly disclosed, rendering it impossible for Plaintiffs and others outside the banks to discern (without sophisticated expert analysis) any discrepancies between Defendants' publicly disclosed LIBOR quotes and other measures of those banks' actual or reasonably expected borrowing costs. Second, communications within and among the Defendants likewise were not publicly available, which further precluded Plaintiffs from discovering Defendants' misconduct, even with reasonable diligence.

185. As a result of the self-concealing nature

of Defendants' collusive scheme, no person of ordinary intelligence would have discovered, or with reasonable diligence could have discovered before March 15, 2011, facts indicating Defendants were unlawfully suppressing LIBOR during the Class Period.

B. THE BBA AND DEFENDANTS DEFLECTED CONCERNS RAISED BY SOME MARKET OBSERVERS AND PARTICIPANTS IN LATE 2007 AND EARLY 2008 ABOUT LIBOR'S ACCURACY.

186. Beginning in or about November 2007 and continuing sporadically into early 2008, concerns arose that the members of the LIBOR panel might be understating their true costs of borrowing, thus causing LIBOR to be set artificially low.

187. In response to those concerns, the BBA conducted an inquiry regarding LIBOR.

188. Notably, shortly after the BBA announced its investigation in April 2008, the LIBOR panel banks raised their reported rates, causing LIBOR to log its biggest increase since August 2007. The banks, including the LIBOR Panel Defendants, thus falsely and misleadingly signaled that any improper reporting of false rates that may have previously occurred had ended.

189. Subsequently, the BBA reported (wrongly) that LIBOR had not been manipulated, thus providing further (incorrect) assurance to Plaintiffs and the public that the concerns expressed by some market participants were unfounded.

190. Moreover, Defendants engaged in a

media strategy that diffused the speculation that had arisen concerning LIBOR—and further concealed their conduct. On April 21, 2008, for instance, Dominic Konstam of Credit Suisse affirmatively stated the low LIBOR rates were attributable to the fact that U.S. banks, such as Citibank and JPMorgan, had access to large customer deposits and borrowing from the Federal Reserve and did not need more expensive loans from other banks: "Banks are hoarding cash because funding from the asset-backed commercial paper market has fallen sharply while money market funds are lending on a short term basis and are restricting their supply."[62]

191. In an April 28, 2008 interview with the *Financial Times*, Konstam continued to defend LIBOR's reliability:

> Libor has been a barometer of the need for banks to raise capital. The main problem with Libor is the capital strains facing banks ... Initially there was some confusion that Libor itself was the problem, with talk of the rate being manipulated and not representative of the true cost of borrowing.[63]

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[62] Gillian Tett & Michael Mackenzie, "Doubts Over Libor Widen," FT.com, available at http://www.ft.com/cms/s/0/d1d9a792-0fbd-11dd-8871-0000779fd2ac.html#axzz1szdS58jE, last accessed on April 24, 2012.

[63] Michael Mackenzie, "Talk of quick fix recedes as Libor gap fails to close," FT.com, available at http://www.ft.com/intl/cms/s/0/3da27a46-5d05-11dd-8d38-

192. On May 16, 2008, in response to a media inquiry, JPMorgan commented, "[t]he Libor interbank rate-setting process is not broken, and recent rate volatility can be blamed largely on reluctance among banks to lend to each other amid the current credit crunch."[64]

193. The same day, Colin Withers of Citigroup assured the public that LIBOR remained reliable, emphasizing "the measures we are using are historic – up to 30 to 40 years old."[65]

194. And in May 2008, *The Wall Street Journal* asked numerous Defendants to comment on the media speculation concerning aberrations in LIBOR. Rather than declining or refusing to comment, those Defendants made affirmative representations designed to further conceal their wrongdoing. On May 29, 2008, for instance, Citibank affirmatively claimed innocence and stated it continued to "submit [its] Libor rates at levels that accurately reflect [its] perception of the market." HBOS similarly asserted its LIBOR quotes constituted a "genuine and realistic" indication of the bank's

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000077b07658.html#axzz1szdS58jE, last accessed on April 24, 2012.

[64] Kirsten Donovan, Jamie McGeever, Jennifer Ablan, Richard Leong & John Parry, "European, U.S. bankers work on Libor problems," reuters.com, available at http://in.reuters.com/article/2008/05/16/markets-rates-bba-idINL162110020080516, last accessed on April 24, 2012.

[65] Id.

borrowing costs.[66]

C. PLAINTIFFS CERTAINLY COULD NOT HAVE KNOWN OR REASONABLY DISCOVERED—UNTIL AT LEAST MARCH 2011—FACTS SUGGESTING DEFENDANTS *KNOWINGLY COLLUDED* TO SUPPRESS LIBOR.

195. Notwithstanding the smattering of statements in late 2007-early 2008 questioning LIBOR's viability, Plaintiffs had no reason to suspect—at least until the existence of government investigations was revealed in March 2011—that Defendants were *knowingly colluding* to suppress LIBOR. Indeed, as a result of Defendants' secret conspiracy—and their fraudulent concealment of relevant information—no facts arose before March 2011 to put Plaintiffs on inquiry notice that a conspiracy to manipulate LIBOR existed.

196. Due to the Defendants' fraudulent concealment, any statute of limitations affecting or limiting the rights of action by Plaintiffs or members of the Class was tolled until March 15, 2011.

197. The Defendants are equitably estopped from asserting that any otherwise applicable period of limitations has run.

CLASS ACTION ALLEGATIONS

198. Plaintiffs bring this action for

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[66] Carrick Mollenkamp & Mark Whitehouse, "Study Casts Doubt on Key Rate."

themselves individually and as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure on behalf of all others who owned (including beneficially in "street name") any of the Relevant LIBOR-Based Debt Securities during the Class Period. Excluded from "Relevant LIBOR-Based Debt Securities" and the Class are debt securities issued by any Defendant as obligor.

199. The Class is so numerous that the joinder of all members is impracticable. During the Class Period there were outstanding more than 5,200 Relevant LIBOR-Based Debt Securities issued by corporate, state and municipal, and foreign sovereign issuers with an outstanding face value in excess of $500 Billion. While the exact number of Class members is unknown to Plaintiffs at this time, Plaintiffs are informed and believe that there are at least thousands of geographically dispersed Class members who suffered injury, inter alia, by receiving less interest pursuant to their Relevant LIBOR-Based Debt Securities during the Class Period.

200. Plaintiffs' claims are typical of the claims of the other members of the Class. Plaintiffs and the members of the Class sustained damages arising out of Defendants' common course of conduct in violation of law as alleged herein. Defendants' wrongful conduct in violation of the antitrust laws directly caused the injuries and damages of each member of the Class.

201. Plaintiffs will fairly and adequately protect the interests of the members of the Class and have retained counsel competent and experienced in class action litigation, including antitrust class action

litigation.

202. Common questions of law and fact exist as to all members of the Class, which common questions predominate over any questions affecting only individual members of the Class. Among the questions of law and fact common to the Class are:

a. whether Defendants conspired with others to depress artificially LIBOR rates in violation of the Sherman Act;

b. whether Defendants' conduct had an anticompetitive and manipulative effect on LIBOR during the Class Period;

c. whether Defendants' conduct had a direct, substantial, reasonably foreseeable, and adverse impact upon interstate commerce in the United States during the Class Period;

d. whether Defendants' conduct depressed the amounts of interest Plaintiffs and the members of the Class earned on their Relevant LIBOR-Based Debt Securities during the Class Period; and

e. the appropriate measure of damages for the injury sustained by Plaintiffs and the members of the Class as a result of Defendants' unlawful activities.

203. A class action is superior to other available methods for the fair and efficient adjudication of this controversy, because joinder of all Class members is impracticable. The prosecution of separate actions by individual members of the Class would impose heavy burdens upon the courts and

Defendants, and would create a risk of inconsistent or varying adjudications of the questions of law and fact common to the Class. A class action, on the other hand, will achieve substantial economies of time, effort, and expense, and will assure uniformity of decision as to persons similarly situated without sacrificing procedural fairness or bringing about other undesirable results.

204. The interest of members of the Class in individually controlling the prosecution of separate actions is theoretical rather than practical. The Class has a high degree of cohesion, and prosecution of the action through a representative is not objectionable. The amounts at stake for individual Class members, while substantial in the aggregate, are not necessarily great enough to enable each of them to maintain a separate suit against Defendants. Plaintiffs do not anticipate any difficulty in the management of this action as a class action.

CLAIM FOR RELIEF

VIOLATION OF SECTION 1 OF THE SHERMAN ACT

205. Plaintiffs incorporate by reference and reallege the preceding allegations, as though fully set forth herein.

206. The Defendants and their unnamed co-conspirators entered into and engaged in a continuing conspiracy, agreement, understanding, or concerted action in unreasonable restraint of interstate trade and commerce in the United States in violation of Section 1 of the Sherman Act.

207. During the Class Period, the Defendants

combined, conspired, and agreed to fix, maintain, and depress the LIBOR rates. Through their positions on the US$ LIBOR panel, Defendants could and did control what LIBOR rates would be reported, and thus controlled the amounts of interest paid on the Relevant LIBOR-Based Debt Securities.

208. In furtherance of the conspiracy, Defendants fixed, maintained, depressed and stabilized LIBOR, a key component in determining the amounts of interest paid on Relevant LIBOR-Based Debt Securities. Accordingly, Defendants' conspiracy is a *per se* violation of Section 1 of the Sherman Act.

209. Defendants' conspiracy, and its resulting impact on the amounts of interest paid on Relevant LIBOR-Based Debt Securities, occurred in or affected interstate commerce.

210. As a direct, reasonably foreseeable, and substantial result of Defendants' unlawful conduct, Plaintiffs and members of the Class have suffered injury to their business or property.

211. Pursuant to Section 4 of the Clayton Act, Plaintiffs and members of the Class are each entitled to treble damages for the violations of the Sherman Act alleged herein.

RELIEF SOUGHT

Accordingly, Plaintiffs demand judgment against Defendants and each of them as follows:

A. Determining that this action may be maintained as a class action under Rule 23(b)(3) of the Federal Rules of Civil Procedure, with Plaintiffs as class representatives and Plaintiffs' counsel as counsel for the Class;

B. Adjudging that Defendants have violated Section 1 of the Sherman Act;

C. Awarding to Plaintiffs and the Class three-fold the damages to be proved at trial;

E. Awarding to Plaintiffs and the Class their costs of the suit, including reasonable attorneys' fees; and

F. Affording to Plaintiffs and the Class such other and further relief as may be just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Rule 38(a) of the Federal Rules of Civil Procedure, Plaintiffs demand a jury trial of all issues triable by a jury.

Dated: April 30, 2012

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[Excerpt from Majority Plaintiffs' Memorandum of Law in Support of Motion for Appointment of Interim Class Counsel and Consolidation of All Related Cases. MDL Docket No. 10; Sept. 1, 2011]

II. THIS LITIGATION IS APPROPRIATE FOR CONSOLIDATION

The Court should consolidate all the Related Actions into a single action because they all arise from common facts and present sufficiently common legal questions. Consolidation of different actions pending before a court is appropriate where, as here, the actions involve "common question[s] of law or fact." *See* Fed. R. Civ. Proc. 42(a); *Kaplan*, 240 F.R.D. at 91. The central factual and legal issues presented by these actions are common.

Consolidation under Rule 42(a) is appropriate where there are factual and legal similarities among the actions, and the defendants overlap in substantial degree. 9 Wright & Miller, *Federal Practice and Procedure* §2384 p. 447 ("Actions involving the same parties are apt candidates for consolidation."); *see generally United Mine Workers of America* v. *Gibbs*, 383 U.S. 715, 724 & n.10 (1966) ("Under the Rules, the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.") (citing, *inter alia*, Fed. R. Civ. P. 42).

As the JPML noted, the Related Actions "share factual issues arising from allegations concerning defendants' participation" in Libor setting. *See* Transfer Order, at 1. These overlapping issues include: whether Defendants agreed or conspired to

manipulate the Libor setting; whether Defendants did manipulate the Libor setting; the scope and duration of any such manipulation; and whether Defendants' conduct caused injury to Plaintiffs and the Class; and the appropriate measure of damages. Because these factual questions are common to all of the Related Actions – and because the issue of Defendants' combination, conspiracy or agreement is common, regardless of what type of Libor-based financial instrument Plaintiffs purchased – consolidation is needed. Consolidation will eliminate duplicative discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel, and the judiciary.

The Related Actions also share substantially overlapping legal claims. All claims concern Defendants' manipulation of Libor, and the impact of that manipulation. The Related Actions primarily allege federal antitrust claims, federal CEA claims, or both. As the Second Circuit has explained, "price manipulation is an evil that is always forbidden under every circumstance by both the [CEA] and the antitrust laws." *Strobl* v. *New York Mercantile Exchange*, 768 F.2d 22, 28 (2d Cir. 1985).[28] "Therefore, application of the latter cannot be said to be repugnant to the purposes of the former." *Id.* (rejecting the argument that the "antitrust laws no longer apply to activity that violates the [CEA]"); *see Friedman* v. *Salomon/Smith Barney*, No. 98 Civ. 5990, 2000 WL

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[28] CEA claims are available only to persons who transact in certain types of futures contracts or options thereon. Section 22 of CEA, 7 U.S.C. § 25.

1804719, at *3 (S.D.N.Y. Dec. 8, 2000) (Buchwald, J) (same), *aff'd* 313 F.3d 796 (2d Cir. 2002), *cert denied* 540 U.S. 822 (2003). In *Strobl*, the plaintiffs tried their antitrust and CEA claims together in the same trial, and prevailed through verdict, post-judgment motions, and appeals. 768 F.2d at 27-28.

Consolidation is especially appropriate here because the antitrust and CEA claims stem from identical conduct. Potential differences between antitrust and CEA claims arise primarily from the fact that collusion greatly helps but is not required to prove manipulation in violation of the CEA. Also, the fact that different categories of the Class may rely on different authority to satisfy the antitrust direct injury requirements, does not prevent consolidation. See In re Crude Oil Commodity Futures Litig., No. 1:11-cv-3600 (S.D.N.Y.) [D.E. 17]. These and any other potential differences may be easily addressed, if appropriate, through the subclassing discussed in Point I.B.4 supra.

The potential differences between the CEA and antitrust causes of action are insufficient to offset the efficiencies generated by consolidating all the actions. *See In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 530 (3d Cir. 2004) ("*Warfarin*") ("[T]he fact that there may be variations in the rights and remedies available to injured class members under the various laws of the fifty states in this matter does not defeat commonality and predominance."); *Kaplan*, 240 F.R.D. at 91 ("Differences in causes of action . . . do not render consolidation inappropriate if the cases present sufficiently common questions of fact and law, and the differences do not outweigh the interests of judicial economy served by consolidation.").

Rather, Rule 42 does not require that actions be identical in order to be consolidated. *Sofran* v. *LaBranche & Co., Inc.*, 220 F.R.D. 398, 401 (S.D.N.Y. 2004); *compare Crude Oil*, 1:11-cv-3600 (S.D.N.Y. July 22, 2011) [D.E. 17-19] (all plaintiffs proposed such consolidation where the antitrust claims involved different class members than the CEA claims did).

As this Court has held, differences in causes of action, defendants, or the class period do not render consolidation inappropriate where, as here, the cases present sufficiently common questions of fact and law, and the differences do not outweigh the interests of judicial economy served by consolidation. *Kaplan*, 240 at 88. The presence here of different parties – especially when most Defendants are overlapping – does not weigh against consolidation. "[C]onsolidation is not barred simply because the actions to be consolidated allege claims against different parties." *Skwortz* v. *Crayfish Co., Ltd.* No. 00-CV-6766, 2001 WL 1160745, at *2 (S.D.N.Y. Sept. 28, 2001). *See also Pinkowitz* v. *Elan Corp.*, PLC, No. 02-CV-865, 2002 WL 1822118, at *3 (S.D.N.Y. July 29, 2002) ("The fact that there are different parties in this action does not mean this case should not be consolidated."). Accordingly, all of the Related Actions, and any similar actions that are subsequently filed in or transferred to this District should be consolidated.

[Memorandum and Order.
MDL Docket No. 66; Nov. 29, 2011]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re: LIBOR-Based Financial Instruments
Antitrust Litigation 11 MD 2262(NRB)

THIS DOCUMENT RELATES TO: All Cases

MEMORANDUM AND ORDER

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

Pursuant to this Court's October 18, 2011 Memorandum and Order, counsel seeking to serve as interim class counsel have presented the Court with supplemental submissions and revised leadership proposals. For the reasons discussed below, we appoint Hausfeld LLP ("Hausfeld") and Susman Godfrey LLP ("Susman Godfrey") as interim class counsel for the putative class of over-the-counter plaintiffs, and we appoint Kirby McInerney LLP ("Kirby McInerney") and Lovell Stewart Halebian Jacobson LLP ("Lovell Stewart") as interim class counsel for the putative class of exchange-based plaintiffs. We also grant the motion to consolidate related class action complaints.

BACKGROUND

This multi-district litigation involves twenty-three related complaints filed against member banks of the British Bankers' Association ("BBA") London Interbank Offer Rate ("LIBOR") Panel (collectively

"defendants"). Plaintiffs in these cases allege that defendants artificially suppressed LIBOR by understating their borrowing costs to the BBA.

In our October 18, 2011 Memorandum and Order, we determined that even though all plaintiffs make similar substantive allegations, separate putative classes should be maintained for those plaintiffs who engaged in over-the-counter transactions and those plaintiffs who purchased financial instruments on an exchange. Because the record was unclear as to the proper classification of several of the plaintiffs, we requested that counsel inform us as to the plaintiffs they currently represent and whether those plaintiffs are over-the-counter purchasers or exchange-based purchasers. Counsel have now provided us with the requested information, and several firms have reorganized their leadership proposals to conform with our decision to maintain separate putative classes.

DISCUSSION

I. Interim Class Counsel Proposals

Previously, the law firms of Grant & Eisenhofer PA ("Grant & Eisenhofer"), Kirby McInerney, Robbins Geller Rudman & Dowd LLP ("Robbins Geller"), and Lovell Stewart had submitted a proposal under which the four firms would act as interim class counsel for both categories of plaintiffs. These firms have now divided, with two of the firms proposing to represent over-the-counter plaintiffs and the other two seeking to represent exchange-based plaintiffs. We are separately presented with an additional class counsel proposal for each of the putative classes. Thus, we are now faced with two proposals with respect to each putative class of plaintiffs.

A. Over-the-Counter Plaintiffs[1]

1. Grant & Eisenhofer Proposal

Grant & Eisenhofer and Robbins Geller – previously part of the four-firm proposal – now seek to represent the putative class of over-the-counter plaintiffs ("Grant & Eisenhofer Proposal"). Robbins Geller currently represents two institutional plaintiffs, Carpenters Pension Fund of West Virginia and City of Dania Beach Police & Firefighters Retirement System, that purchased floating rate debt tied to LIBOR from one or more of the defendants. Grant & Eisenhofer currently represents Ravan Investments, LLC ("Ravan"), an institutional plaintiff that entered into unspecified types of over-the-counter transactions with defendant UBS. The Grant & Eisenhofer Proposal is also supported by plaintiff's counsel in *Insulators & Asbestos Workers Local 14 v. Bank of Am. Corp.*, No. 11 Civ. 3781 (S.D.N.Y.).

2. Baltimore Proposal

Hausfeld and Susman Godfrey submit a competing

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[1] We have also received a motion for appointment as interim class counsel from the law firms of Scott & Scott LLP and Robbins, Kaplan, Miller & Ciresi LLP. These firms seek to represent a putative class of plaintiffs that engaged in interest rate swaps only. This motion was submitted on November 15, 2011, roughly two and a half months after the deadline we set for counsel to submit motions for appointment as interim class counsel. We deny these firms' motion on this ground alone, but we also note that after reviewing the firms' submissions, we disagree that there is a need for separate putative class treatment for plaintiffs who engaged in different forms of over-the-counter transactions.

proposal with respect to the over-the-counter plaintiffs ("Baltimore Proposal"). These firms currently represent the Mayor and City Council of Baltimore in connection with Baltimore's having entered into "hundreds of millions of dollars" of interest rate swaps with defendants.

B.Exchange-Based Plaintiffs

1.Kirby McInerney Proposal

Kirby McInerney and Lovell Stewart – the other two firms in the previous four-firm proposal – now seek to represent the putative class of exchange-based plaintiffs ("Kirby McInerney Proposal"). Kirby McInerney currently represents two foreign institutional investors, FTC Capital GmbH and Metzler Investment GmbH, that purchased exchange-based derivatives. Lovell Stewart currently represents Roberto E. Calle Gracey, an individual investor who purchased LIBOR-based futures contracts on the Chicago Mercantile Exchange. The Kirby McInerney Proposal also has the support of plaintiffs in six of the other cases pending before this Court.[2]

2.Lowey Dannenberg Proposal

The law firm Lowey Dannenberg Cohen & Hart PC ("Lowey Dannenberg") also seeks to be appointed interim class counsel for the exchange-based plaintiffs. In the initial round of submissions on this issue, Lowey Dannenberg did not actually apply to serve as

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[2] These plaintiffs are 303030 Trading LLC, Atlantic Trading USA, LLC, AVP Properties LLC, Independence Trading Inc., Gary Francis, and Nathanial Haynes.

interim class counsel, but rather acquiesced to the previously referenced four-firm proposal, under which Lowey Dannenberg would have served as a "designated fiduciary" for exchange-based plaintiffs. Lowey Dannenberg currently represents Jeffrey Laydon and Richard Hershey, two individual investors who purchased LIBOR-based futures contracts.

II. Interim Class Counsel Selection

Rule 23(g) of the Federal Rules of Civil Procedure allows a court to "designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action." Fed. R. Civ. P. 23(g)(3). The designation of interim class counsel is especially encouraged in cases such as the instant matter where there are multiple, overlapping class actions that require extensive pretrial coordination. *See In re Air Cargo Shipping Servs. Antitrust Litig.*, 240 F.R.D. 56, 57 (E.D.N.Y. 2006) (citing MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.11 (2004)).

The considerations set out in Rule 23(g)(1)(A), which govern the appointment of class counsel once a class is certified, are widely accepted to apply to the designation of interim class counsel before certification as well. *See id.*; *see also Walker v. Discover Fin. Servs.*, No. 10-cv-6994, 2011 WL 2160889, at *2 (N.D. Ill. May 26, 2011). These criteria include: (1) the work counsel has done in identifying or investigating potential claims; (2) counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action; (3) counsel's knowledge of the applicable law; and (4) the resources counsel will devote to representing the class. Fed. R. Civ. P. 23(g)(1)(A).

Unfortunately, the application of these factors does not guide us to a particular result in this case. All of the firms submitting applications have extensive experience in complex litigation, and we are more than confident that they have adequate knowledge of the applicable law. In addition, we have little doubt that the firms would each devote significant resources to prosecuting plaintiffs' claims. Finally, although certain of the firms may have brought suit earlier than others, all of the firms have demonstrated that they have thoroughly investigated the relevant claims, rendering this factor not determinative. We are therefore forced to rely on other case-specific factors to choose between the competing proposals.

A. Over-the-Counter Plaintiffs

Although the Grant & Eisenhofer Proposal carries the support of a greater number of plaintiffs, the Baltimore Proposal has the support of a plaintiff with by far the greatest economic interest. As previously referenced, the Mayor and City Council of Baltimore claim that Baltimore entered into hundreds of millions of dollars of interest rate swaps with defendants. Plaintiffs supporting the Grant & Eisenhofer Proposal do not allege to have held anywhere near this level of exposure. Furthermore, the market for interest rate swaps in general constitutes an extremely high percentage of the overall market for over-the-counter LIBOR-based transactions. Counsel for Baltimore present data suggesting that the worldwide nominal value of LIBOR-based interest rate swaps - $300 million as of September 2008 - is nearly thirty times

the market for LIBOR-based debt (which is the market in which plaintiffs represented by Robbins Geller participated).[3] While this case is not governed by the Private Securities Litigation Reform Act of 1995, and therefore we are not guided entirely by the magnitude of a plaintiff's economic interest, we nevertheless find this consideration highly relevant.

We also find persuasive the fact that Hausfeld maintains an office in London with a full-time staff of at least five solicitors. Given that the case appears to involve extremely complicated factual issues, we believe that having dedicated and locally trained attorneys at the site of the core operative facts could prove extremely beneficial.

Finally, although less important to our determination, we note that Hausfeld and Susman Godfrey have only ever sought to represent over-the-counter plaintiffs, while Grant & Eisenhofer and Robbins Geller previously sought to represent exchange-based plaintiffs as well. Although we have no doubt that the latter two firms would zealously pursue the interests of over-the- counter plaintiffs were we to appoint them, there is some possibility that these plaintiffs could be prejudiced by their counsel having minimized the antitrust standing questions facing the exchange-based plaintiffs, and more generally from having suggested that all plaintiffs

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[3] As previously described, Grant & Eisenhofer has not specified the type of over-the-counter transactions entered into by its client, Ravan. However, even if Ravan did enter into interest rate swaps, we safely assume that the size of its holdings did not approach that of Baltimore's.

should be treated in a like manner.

Based on these considerations, we appoint Hausfeld and Susman Godfrey as interim class counsel for the putative class of over-the-counter plaintiffs.

B.Exchange-Based Plaintiffs

Our decision with respect to interim class counsel for the exchange-based plaintiffs is less difficult. Kirby McInerney and Lovell Stewart currently represent two institutional plaintiffs and one individual plaintiff, and the firms' proposal has the support of plaintiffs in six other cases. In contrast, Lowey Dannenberg currently represents just two individual plaintiffs and its proposal has the support of no other plaintiffs. The diversity and sheer number of plaintiffs supporting the Kirby McInerney Proposal are compelling factors in favor of their appointment.

We also find that Kirby McInerney and Lovell Stewart have adequately addressed the Article III standing issues raised by Lowey Dannenberg with respect to the foreign plaintiffs represented by Kirby McInerney. With that said, we caution that if any representation made by Kirby McInerney and Lovell Stewart on this issue is found to be inaccurate, and the proposed plaintiffs lack standing as a result, Kirby McInerney and Lovell Stewart will be removed as lead counsel and Lowey Dannenberg will be substituted.[4]

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[4] This Court experienced the waste and delay that occurs when a proposed plaintiff is found to lack standing in *In re IMAX Securities Litigation*, 06 Civ. 6128 (S.D.N.Y). We have no interest in reliving that experience when the issue of standing has been raised up front.

Subject to this proviso, we appoint Kirby McInerney and Lovell Stewart as interim class counsel for the exchange-based plaintiffs.

III. Consolidation

We have also been presented a motion to consolidate the related class action complaints before this Court.[5] (Docket no. 10 at 22-25.)

Consolidation of actions under Federal Rule of Civil Procedure 42(a) is appropriate when "actions before the court involve a common question of law or fact." Fed. R. Civ. P. 42(a). Here, there is substantial overlap in defendants across the cases, and the underlying factual issues presented are seemingly identical—namely whether these defendants deliberately manipulated LIBOR. The legal issues presented are also common across the complaints, as the cases to be consolidated all involve claims under the Sherman Antitrust Act and/or the Commodity Exchange Act.

We therefore consolidate all related class action complaints pending before this Court, as well as any future class action complaints alleging

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[5] The motion does not seek consolidation of three cases not filed as class action complaints that were transferred to this Court by the Judicial Panel of Multi-District Litigation ("JPML") on September 14, 2011: *Schwab Money Market Fund v. Bank of America Corp.*, No. 11 Civ. 6412 (N.D. Cal.); *Charles Schwab Bank v. Bank of America Corp.*, No. 11 Civ. 6411 (N.D. Cal.); *Schwab Short-Term Bond Market Fund v. Bank of America Corp.*, No. 11 Civ. 6409 (N.D. Cal.). Accordingly, we do not consolidate these actions with the related class action complaints.

similar conduct and raising the same legal claims.

CONCLUSION

For the foregoing reasons, we hereby order: (1) that the LIBOR-related class action complaints currently pending before this Court be consolidated for all purposes under Federal Rule of Civil Procedure 42(a),[6] under the following caption: *In Re: Libor-Based Financial Instruments Antitrust Litigation*, Master File No. 1:11-md-02262-NRB; (2) that the law firms of Hausfeld LLP and Susman and Godfrey LLP are appointed to serve as interim class counsel for the putative class of over-the-counter plaintiffs; (3) that the law firms of Kirby McInerney LLP and Lovell Stewart Halebian Jacobson LLP are appointed to serve as interim class counsel for the putative class of exchange-based plaintiffs; and (4) within 20 days, interim class counsel shall submit to this Court a proposed order to facilitate their representation of the putative classes and to advance the conduct and progress of the litigation.[7]

SO ORDERED

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[6] The captions of these cases are: 11 Civ. 2613; 11 Civ. 2883; 11 Civ. 3128; 11 Civ. 3249; 11 Civ. 3423; 11 Civ. 3781; 11 Civ. 3925; 11 Civ. 4421; 11 Civ. 4736; 11 Civ. 5450; 11 Civ. 5638; 11 Civ. 5640; 11 Civ. 5641; 11 Civ. 5927; 11 Civ. 5928; 11 Civ. 5929; 11 Civ. 5930; 11 Civ. 5931; 11 Civ. 7676; 11 Civ. 7715.

[7] If counsel believes that the litigation would benefit from an in-person conference before the Court to discuss the next steps to be taken in the litigation, they are invited to contact the Court so informing us.

Dated: New York, New York
November 29, 2011

NAOMI REICE BUCHWALD
UNITED STATES DISTRICT JUDGE

[Pre-Trial Order No. 2.
MDL Docket No. 206; Aug. 14, 2012]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE LIBOR-BASED FINANCIAL INSTRUMENTS ANTITRUST LITIGATION	MDL No. 2262 Master Case 11-md-2262 (NRB)
THIS DOCUMENT RELATES TO: Case No. 12 CV 1025 (NRB)	ECF Case
ELLEN GELBOIM and LINDA ZACHER, individually for themselves and on behalf of all others similarly situated, Plaintiffs -against- CREDIT SUISSE GROUP AG, *et al.* Defendants	**PRE-TRIAL ORDER NO. 2**

UPON the Court's entry of Pre-Trial Order No. I (Doc 78-1) in the multi-district *LIBOR-Based Financial Instruments Antitrust Litigation* before this action, No. 12-cv-1025 (NRB), had been filed, and the Court's subsequent acceptance of this action into the MDL litigation (Docs 117, 152):

IT IS HEREBY ORDERED THAT:

A. Consolidation and Coordination of Bondholder Plaintiff Actions

1. *Ellen Gelboim and Linder Zacher v. Credit Suisse Group AG, et al.*, Case No. 12 CV 1025 (NRB), is designated as the lead action for all class actions brought on behalf of holders of LIBOR-based debt securities not issued by any Defendant ("Bondholder Plaintiff Action") that may hereafter be filed in or transferred to this Court as related to *In re LIBOR-Based Financial Instruments Antitrust Litigation*, MDL No. 2262.

2. If a case that arises out of the same subject matter as *In re LIBOR-Based Financial Instruments Antitrust Litigation* and is brought as a class action on behalf of a Bondholder plaintiff is hereafter filed in this Court or is transferred from another court (together. a "'Subsequent Bondholder Plaintiff Action"), the Court will direct the Clerk to:

a. file a copy of this Order in the separate file for such action;

b. consolidate the Subsequent Bondholder Plaintiff Action with the Bondholder Plaintiff Action by transferring the case to the docket for *In re LIBOR-Based Financial Instruments Antitrust Litigation*, MDL No. 2262, and *Ellen Gelboim and Linda Zacher v. Credit Suisse Group AG, et al.*, Case No. 12-cv-1025 (NRB); and

c. close the docket for the Subsequent Bondholder Plaintiff Action.

3. The Court requests the assistance of counsel in calling to the attention of the Court the filing of any Subsequent Bondholder Plaintiff Action that might properly be consolidated or coordinated as a debt-securities holder action.

4. Every document filed exclusively relating to the Bondholder Plaintiff Action shall bear the following caption:

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE LIBOR-BASED FINANCIAL INSTRUMENTS ANTITRUST LITIGATION	MDL No. 2262
THIS DOCUMENT RELATES TO: BONDHOLDER PLAINTIFF ACTION, Case No. 12-cv-1025 (NRB)	Master File No. 1:11-md-02262-NRB ECF Case

B. Organization of Bondholder Plaintiff Counsel

5. Pursuant to Fed. R. Civ. P. 23(g)(3), the Court designates as Interim Co-Lead Counsel for the Bondholder Plaintiff class. Weinstein Kitchenoff & Asher LLC and Morris and Morris LLC Counselors At Law ("Bondholder Plaintiff Interim Co-Leads"). who shall be solely responsible for coordinating and organizing plaintiffs in the conduct of the Bondholder Plaintiff Action and, in particular, shall have the following responsibilities.

a. To make, brief, and argue motions, and to file papers and participate in proceedings initiated by other parties;

b. To initiate, conduct, and defend discovery proceedings;

c. To act as spokesperson at pretrial conferences;

d. To negotiate with defense counsel with respect to settlement and other matters:

e. To call meetings of counsel for plaintiffs in the Bondholder Plaintiff Action:

f. To make all work assignments to plaintiffs' counsel for the Bondholder Plaintiff Action to facilitate the orderly and efficient prosecution of this litigation and to avoid duplicative or unproductive effort;

g. To conduct trail and post-trial proceedings;

h. To consult with and employ experts;

i. To request that the Court approve settlements, if any, and fee awards;

j. To allocate fees:

k. To perform such other duties and to undertake such other responsibilities as they deem necessary or desirable in the prosecution of this litigation;

l. To coordinate with co-lead counsel for the Exchange-Based Plaintiff Action, co-lead counsel for the Over-the-Counter Plaintiff Action, counsel for any Bondholder plaintiff, any other lead or co-lead class counsel that may hereafter be appointed, and counsel for

non-class plaintiffs in In re LIBOR-Based Financial Instruments Antitrust Litigation; and

m. To coordinate and communicate with defendants' counsel with respect to matters addressed in this paragraph or its subparts.

The designation of Bondholder Plaintiff Interim Co-Leads in this Paragraph 5 is without prejudice to the right of other counsel to move for modification of such designation upon good cause shown.

6. No motion, request for discovery, or other pretrial proceedings shall be initiated or filed by any plaintiff in the Bondholder Plaintiff Action except through Bondholder Plaintiff Interim Co-Leads, and no counsel in the Bondholder Plaintiff Action shall be authorized to per- form any work in the case without the express authorization of the Bondholder Plaintiff Interim Co-Leads.

7. Bondholder Plaintiff Interim Co-Leads shall be the contact between plaintiffs' counsel in the Bondholder Plaintiff Action and defendants' counsel, Exchange-Based Plaintiffs' counsel, Over-the-Counter Plaintiffs' counsel, any other lead or co-lead class counsel that may hereafter be appointed, counsel for non-class plaintiffs in *In re LIBOR-Based Financial Instruments Antitrust Litigation,* and any counsel for any Bondholder plaintiff, as well as spokespersons for plaintiffs' counsel in the Bondholder Plaintiff Action. Bondholder Plaintiff Action Co- Leads arc designated as the contact persons from plaintiffs' counsel in the Bondholder Plaintiff Action and as the attorneys of record with whom the Court will be dealing throughout the course of this litigation.

8. All plaintiffs' counsel in the Bondholder Plaintiff Action shall submit their up-to-date time and expenses on a monthly basis in the form set forth by Bondholder Plaintiff Action Co-Leads or on such other schedule as may be established, from time-to-time, by Bondholder Plaintiff Action Co-Leads.

9. Defendants shall effect service of papers on plaintiffs in the Bondholder Plaintiff Action by serving a copy on each Bondholder Plaintiff Action Co-Lead by electronic mail (including the Court's Electronic Case Filing system), overnight mail, telecopy, or hand delivery. Bondholder Plaintiff Interim Co-Leads shall effect service on plaintiffs in the Bondholder Plaintiff Action by serving a copy on all other counsel for plaintiffs in the Bondholder Plaintiff Action by electronic mail (including the Court's Electronic Case Filing system), overnight mail, telecopy or hand delivery.

No Waiver

10. The terms of this Order, the consolidation and coordination ordered herein, and the appointment of Bondholder Plaintiff Interim Co-Leads shall not constitute a waiver by any party of any claims in or defenses to any of the actions.

SO ORDERED

Dated: New York, New York, August 14, 2012

NAOMI REICE BUCHWALD

UNITED STATES DISTRICT JUDGE

[Excerpt from District Court hearing transcript, pages 77-80. MDL Docket No. 551; Feb. 4, 2014]

THE COURT: I think that the only other issue out there is the request for 54(b) certification. It's not happening. For two reasons. I one, I think it is pretty clear from what I wrote in the first place that I was never enthusiastic on that issue. And given the reaction of the Second Circuit more than once, it truly is time to give it up at least, at least now.

MR. SUBRAMANIAN: Your Honor, if I could address that briefly. The Second Circuit never addressed the 54(b) issue. In fact, the case that it relied on said that 54(b) was the vehicle to appeal this type of issue in this context.

THE COURT: I'm not – look, this case has a wonderful host of interesting issues. We could send six issues up to the circuit. We're not doing that. We're not doing it seriatim. We're going to clean up this complaint.

I'm not saying that I'm ever certifying the question. But we're not picking and choosing particular questions and sending them up.

MR. SUBRAMANIAN: Your Honor, we're talking about a dispositive -- an issue that disposed of the primary claim in this entire multidistrict litigation.

The name of this litigation is the LIBOR Financial Instruments Antitrust Litigation. And all the plaintiffs, both in these active cases and in the stayed cases, are in favor of an appeal now because it makes perfect sense in terms of judicial economy, fostering

settlement, providing guidance for future claims, and in avoiding future duplicative trials down the road.

And the issue is fully separable from everything in the case. It's not just one of many issues that we could send up on appeal. This is a unique and important issue on the primary claim on the case.

And your Honor noted earlier that what you want to do at this phase of the case is figure out who is going forward, which parties, and so that everything could be cleaned up. Well part of that is figuring out whether there's an antitrust claim here and knowing that once and for all. And it serves a lot of purposes to get a definitive answer on that question.

And your Honor, I'm really sorry. But Mr. Silverman asked a question. We entertained it. I really would like to address the issue of the unjust enrichment claim at the very least as opposed -- you know, in reference to the nontransacting banks because I do think that there is a strong claim against the nontransacting banks on that basis.

THE COURT: I'm sure you do. But the fact is you've had a lot of briefing time. If I give you – I don't play by my rules for you, I have to not play by my rules for everybody else who presumably came here prepared to say something and who is going to be frustrated because they didn't get to say what was on their mind. It's not that we've been here for two hours and that's a reason to stop, but these really were the questions that I needed the input of counsel on. The others I have a very smart law clerk and he and I can talk about this stuff and figure it out and we can read your cases and it's not going to -- whatever we decide

will not be enhanced by additional argument of counsel.

MS. MORRIS: Your Honor, Karen Morris for the bondholder plaintiffs. I just want to ask a question about the 54(b) decision.

Taking your point that you're going to be deciding on the various motions to dismiss, it may help the parties in having conversation to think about the organizational issues that you've mentioned, if you might entertain the 54(b) several months from now when your Honor's decision may come out, that way we'll have a sense of the issues that could go up to the Second Circuit; that way we'd get a timely indication so that for discovery we know which claims are in, which claimants are going to be here, so that we can organize the discovery in a reasonable way. So it's something I would ask the Court to entertain and maybe give us a little bit of direction so the parties can talk during this period while your Honor

THE COURT: I'm not prepared to give you an answer on that now.

I think we're done then.

[Letter from the District Court to All Counsel. MDL Docket No. 572; July 18, 2014]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

July 17, 2014

Re: In re LIBOR-Based Financial Instruments Antitrust Litigation
11Md. 2262 (NRB)

Dear Counsel:

The issuance of our June 23, 2014 Memorandum and Order, which defines the contours of the complaints that we have considered to date, requires that we now address the next steps necessary to move this litigation forward.

At the outset, we wish to make it clear to all parties that we are well aware of the Supreme Court's decision to grant certiorari on the issue of the appealability of the antitrust issue at this stage of the litigation. However, given the length of time that can reasonably be expected to pass before the issue is resolved (regardless of the outcome in the Supreme Court), we cannot await the outcome and will proceed on the substantive record as it now stands.

Also, as a preliminary matter, considering the number of complaints in this MDL, it would be very helpful if the plaintiffs could select a liaison counsel who would serve much in the same way as Davis Polk has on behalf of defendants.

From this Court's perspective, the first order of business is a case-by-case determination of which claims remain in all the pending cases after the rulings in *LIBOR I, II,* and *III.* Once liaison counsel has been selected, it would be immensely helpful if the Court could be provided with an Excel spreadsheet charting all the pending cases, which claims in those cases have been dismissed, and which claims remain viable.

Further, I would hope that liaison counsel would confer with defendants' counsel so that the chart would be agreed upon before submission.

If, following the creation of the spreadsheet, the defendants conclude that there are viable motions to dismiss causes of action which have not been the subject of previous rulings by the Court, defendants should submit pre-motion letters in accordance with my individual practices. Plaintiffs whose claims are the subject of potential motions should file responsive letters. To that extent, we lift the stay on the later filed cases.

Obviously, another subject that must be addressed is the transition from interim to formal classes. Among the issues that we perceive are whether there should be adjustments to the existing classes and/or the creation of new ones. Further, we seek the parties' input on whether there is discovery that must precede the making of class certification motions. To achieve such input, the stay will be lifted in this respect as well. The Court does, however, expect that any such submission will be coordinated and not duplicative.

Finally, the spreadsheet should be submitted no later than August 5; any pre-motion letters by August

13; and plaintiffs' responsive letters by August 20. We anticipate holding a conference in September or very early October. After we receive the August submissions, we will set a date for that conference, as well as dates for submissions addressing the class certification issues we have noted and any other issues the parties may wish to raise.

Very truly yours,

Naomi Reice Buchwald
United States District Judge

[Letter to Judge Naomi Reice Buchwald on behalf of all Plaintiffs. MDL Docket No. 574. Aug. 5, 2014]

[Susman Godfrey L.L.P. Letterhead]

August 5, 2014

BY HAND AND ECF

The Honorable Naomi Reice Buchwald
United States District Court for the Southern District of New York
United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: *In re LIBOR-Based Financial Instruments Antitrust Litigation*, No. 11-md-2262 (NRB)

Dear Judge Buchwald:

Counsel for the plaintiffs have conferred and respectfully request that the Court appoint Susman Godfrey LLP and Kirby McInerney LLP as liaison counsel for the class plaintiffs. In addition, as there are a large number of individual actions with issues that do not overlap completely with the class actions, we respectfully request that the Court appoint

Dickstein Shapiro as liaison counsel for the individual actions.

The enclosed spreadsheet, which was prepared in consultation with defendants and submitted with their agreement, charts all the pending cases, identifying which claims have been dismissed and which remain viable. The Court's decisions in *LIBOR I*, *II*, and *III* dismissed certain claims in the Over-the-Counter, Exchange-Based, and Bondholder putative class cases and the initial Schwab individual actions; those rulings are noted on the chart. The claims in the other cases have not been dismissed and therefore are identified as "pending" on the chart.[1] (Plaintiffs in the remaining cases are aware of the Court's decisions and respectfully reserve their rights on their pending claims.)

Liaison counsel will confer with defendants about a process for addressing issues related to this chart and the Court's July 17 letter, including (1) dismissals of claims in some cases by agreement, (2) amendments of

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[1] The docket entry for *LIBOR I*, #286, states that motions to dismiss were granted in part in cases other than the lead cases. This docket entry appears to be in error as the motions to dismiss were not directed at the complaints in these other cases. For example, the cases brought by the City of Riverside (13-cv-0597), County of San Mateo (13-cv-0625), East Bay Municipal Utility District (13-cv-0626), the City of Richmond (13-cv-0627), and the County of San Diego (13-cv-0667), all represented by Cotchett, Pitre & McCarthy LLP, were transferred to the MDL on January 25, 2013, after the stay order was issued and the briefing on the motions to dismiss was complete, but the docket entry erroneously identifies them as cases in which the motions to dismiss were granted in part and denied in part.

complaints (some plaintiffs plan to amend their complaints and do not intend to waive their rights by not identifying potential amendments on this chart), and (3) class case administration questions such as adjustments to existing classes, creation of new classes, and appointment of any interim lead counsel in the previously stayed class cases.

Sincerely,

William Christopher Carmody
SUSMAN GODFREY LLP

David Kovel
KIRBY MCINERNEY LLP

cc: All Counsel (By ECF)

[Letter to Judge Naomi Reice Buchwald on behalf of All Defendants, with Sched. A and B. MDL Docket No. 594; Aug. 13, 2014]

[Davis Polk & Wardwell LLP Letterhead]

August 13, 2014

BY HAND DELIVERY AND ECF

Re: *In re LIBOR-Based Financial Instruments Antitrust Litigation*,
Master File No. 1:11-md-2262-NRB

Honorable Naomi Reice Buchwald
United States District Judge
Daniel Patrick Moynihan Courthouse
500 Pearl Street
New York, New York 10007-1312

Dear Judge Buchwald:

Pursuant to Your Honor's letter to counsel dated July 17, 2014, this pre-motion letter is submitted on behalf of all defendants with respect to their proposed motion to dismiss plaintiffs' (1) federal and state antitrust; (2) federal and state RICO; (3) CEA; and (4) contract and unjust enrichment claims against defendants with which a plaintiff did not transact, based on the Court's rulings to date, and for a more definite statement regarding contract and unjust enrichment claims where plaintiffs fail to identify the defendants with which they dealt.

Antitrust

A number of the stayed actions assert claims under federal and state antitrust laws. Although the precise fact allegations vary somewhat, all are based on the same core theory, that the defendants restrained competition by conspiring to make false USD LIBOR submissions to the British Bankers Association ("BBA"). This Court has twice ruled, however, that the submission and publication of LIBOR rates was not a competitive process, and that even if the allegations of false reports were true as alleged, no harm to competition and thus no antitrust injury resulted. *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 962 F. Supp. 2d 606, 627 (S.D.N.Y. 2013) (*LIBOR II*); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 687-89 (S.D.N.Y. 2013) (*LIBOR I*). In the face of these rulings, none of the federal and state antitrust claims can survive. Attached as Schedule A is a list of the actions asserting such claims.

RICO

Similarly, this Court ruled in *LIBOR I* that federal RICO claims must be dismissed for two reasons: the exclusion of claims covered by the federal securities laws and the absence of extraterritorial application. *LIBOR I*, 935 F. Supp. 2d at 726-34. The Court found that the alleged activities of the RICO "enterprise" were in England. *Id.* at 733-34. That finding is equally applicable to the RICO claims in all of the stayed actions. Although the Second Circuit has subsequently held that federal RICO claims can reach foreign conduct in some circumstances, it limited that holding to situations in which the alleged predicate criminal violations were based on laws with clearly

expressed extraterritorial application. *European Cmty. v. RJR Nabisco, Inc.*, __ F. 3d __, 2014 WL 1613878, at *5 (2d Cir. Apr. 23, 2014). Defendants submit that none of the alleged predicate violations in the remaining federal RICO claims have such extraterritorial application, and Plaintiffs do not allege domestic conduct sufficient to state a domestic RICO claim. Therefore, this Court's ruling regarding no extraterritorial application precludes those claims as well. In addition, most, if not all, of the federal RICO claims include allegations that would have been actionable under the federal securities laws and are therefore likewise precluded under the Court's alternative reasoning in *LIBOR I*, 935 F. Supp. 2d at 731.

The plaintiff in *Prudential Investment Portfolios 2 v. Bank of America Corp.*, No. 14-cv-4189 (S.D.N.Y. filed May 19, 2014), additionally asserts a RICO claim under New Jersey law. Defendants submit that that claim is even more clearly precluded by the Court's prior rulings. It is a "well-settled principle that New Jersey law regulates conduct in New Jersey, not outside the state,'" *Archut v. Ross Univ. Sch. of Veterinary Med.*, No. 10-1681 (MLC), 2012 WL 5867148, at *12 (D.N.J. Nov. 19, 2012) (quoting *Buccilli v. Timby, Brown & Timby*, 660 A.2d 1261, 1263 (N.J. App. Div. 1995)), and the New Jersey RICO statute fails to manifest any legislative intent to apply extraterritorially. The New Jersey RICO claim should therefore be dismissed as well. A list of the actions that assert federal and/or state RICO claims is attached as Schedule B.

CEA

The only stayed case asserting CEA claims is *Amabile v. Bank of America Corp.*, No. 13-cv-1700 (S.D.N.Y. filed Mar. 13, 2013), brought by individuals who allegedly traded Eurodollar futures contracts on undisclosed dates. Most of the CEA claims in *Amabile* should be dismissed in conformity with the Court's rulings in the Exchange-Based Plaintiffs' putative class action. First, to the extent that the *Amabile* plaintiffs allege persistent suppression of LIBOR and seek to recover based on transactions in Periods 1 and 2, those claims are plainly time-barred. *LIBOR I*, 935 F. Supp. 2d at 711-13; *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, –F. Supp. 2d –, --, 2014 WL 2815645, at *16-19 (S.D.N.Y. June 23, 2014) (*LIBOR III*). Second, all claims for "manipulation of LIBOR as a commodity" must also be dismissed. *LIBOR I*, 935 F. Supp. 2d at 720-21. Third, to the extent the plaintiffs allege episodic trader-based manipulation, all such claims must be dismissed because plaintiffs have alleged no injury as required by 7 U.S.C. § 25(a)(1). The *Amabile* plaintiffs fail to plead, as required by the Court's rulings, that any allegedly artificial submission, by any defendant, had a potential impact on the published LIBOR fix for any day on which the *Amabile* plaintiffs traded in a Eurodollar futures contract, much less that their position on that day was such that they were injured. Indeed, they do not even allege any dates on which they supposedly traded in Eurodollar futures contracts. *See LIBOR II*, 962 F. Supp. 2d at 620-21; *LIBOR III*, 2014 WL 2815645, at *7.

Breach of Contract and Unjust Enrichment

In *LIBOR III*, the Court ruled that, with respect to breach of contract/implied covenant of good faith and fair dealing and unjust enrichment, no claim lay by a plaintiff against a defendant with which it did not contract or have any dealings to support an unjust enrichment claim. *LIBOR III*, 2014 WL 2815645, at *23. A number of stayed actions include similar contract and/or unjust enrichment claims. In some cases, the complaints are specific as to the defendants with which plaintiffs dealt. But several actions plead contract and/or unjust enrichment claims without identifying the defendants with which they contracted or had dealings. A more definite statement under Fed. R. Civ. P. 12(e) is necessary in those cases so that defendants and the Court can identify the defendants, if any, against which plaintiffs can state a claim, as well as the contracts or other dealings that would allegedly form the basis for such a claim. *See Agilent Techs., Inc. v. Micromuse, Inc.*, 2004 U.S. Dist. LEXIS 20723, at *11 (S.D.N.Y. Oct. 19, 2004) (motions for more definite statement are appropriate "[w]here . . . a pleading is sufficient to provide notice of the claim but does not contain sufficient information to allow a responsive pleading to be framed without risk of prejudice").[1] In other cases, similar to the action addressed in *LIBOR I*, the plaintiffs assert unjust enrichment claims despite not having dealt with any

[1] Identification of the contracts or other alleged dealings are appropriate to aid the defendants in assessing whether they have a motion to dismiss based on the particulars of such contract or other alleged dealing.

defendant, and therefore those claims must be dismissed. And in several other cases, similar to the action addressed in *LIBOR III*, named plaintiffs assert contract and/or unjust enrichment claims not only against defendants with which they allegedly transacted, but also defendants with which they allege no dealings.[2] To the extent the contract and/or unjust enrichment are alleged against non-transacting defendants, those claims should be dismissed as in *LIBOR III*.[3] Attached as Schedule C is a list of the actions which assert contract and/or unjust enrichment claims without identifying defendants with which the plaintiffs dealt. Attached as Schedule D is a list of the actions which assert unjust enrichment claims by plaintiffs who did not deal with any defendant. Attached as Schedule E is a list of the actions which appear to assert contract and/or unjust enrichment claims against both contractual counterparties and "stranger" defendants.

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[2] The proposed motions will set forth individualized arguments by certain defendants regarding the absence of an alleged contractual or other direct relationship between the plaintiff and the defendant.

[3] Additionally, in *LIBOR II*, the court ruled that a plaintiff may not state a claim for breach of an express contractual provision absent "an explicit term" in the parties' contract that precluded the conduct alleged by plaintiffs, and that a contractual provision that the parties' interest rate would be based on USD LIBOR, "though it may give rise to an implied duty, is not such an explicit term." *LIBOR II*, 962 F. Supp. 2d at 631 n.31. Claims for breach of an express contract that do not allege such an explicit term should therefore be dismissed as well.

Respectfully yours,

/s/ Robert F. Wise

SCHEDULE A

Federal and state antitrust claims

FTC Capital GMBH, v. Credit Suisse Grp. AG (11-cv-2613) (federal)

Mayor and City Council of Balt. v. Bank of Am. Corp. (11-cv-5450) (federal)

Charles Schwab, N.A. v. Bank of Am. Corp.; Schwab Money Market Fund, v. Bank of Am. Corp.; Schwab Short-Term Bond Market Fund v. Bank of Am. Corp. (11-cv-6409; 11-cv-6411; 11-cv-6412) (federal; CA)

Ellen Gelboim v. Credit Suisse Grp. AG (12-cv-1025) (federal)

33-35 Green Pond Road Assocs., LLC v. Bank of Am. Corp. (12-cv-5822) (federal)

Lieberman v. Credit Suisse Grp. AG (12-cv-6056) (AK, AL, AZ, CA, DC, IA, KS, ME, Ml, MN, MS, NE, NV, NM, NY, NC, ND, OR, SD, UT, VT, WV, WI and WY)

Courtyard at Amwell II, LLC v. Bank of Am. Corp. (12-cv-6693) (federal)

Adams v. Bank of Am. Corp. (12-cv-7461) (federal; NY)

Guar. Bank & Trust Co. v. Credit Suisse Grp. AG (13-cv-0346) (federal; AZ, CA, DC, FL, HI, IL, IA, KS, ME, MI, MN, MS, NE, NV, NM, NY, NC, ND, OR, SD, TN, VT, WV and WI)

L.A. Cnty. Emps. Ret. Ass'n v. Bank of Am. Corp. (13-cv-0398) (CA)

Earle v. Bank of Am. Corp. (13-cv-0407) (federal)

City of Riverside v. Bank of Am. Corp. (13-cv-0597) (federal; CA)

Cnty. of San Mateo v. Bank of Am. Corp. (13-cv-0625) (federal; CA)

E. Bay Mun. Util. Dist. v. Bank of Am. Corp. (13-cv-0626) (federal; CA)

City of Richmond v. Bank of Am. Corp. (13-cv-0627) (federal; CA)

Cnty. of San Diego v. Bank of Am. Corp. (13-cv-0667) (federal; CA)

Dirs. Fin. Grp. v. Bank of Am. Corp. (13-cv-1016) (CA)

Cnty. of Riverside v. Bank of Am. Corp. (13-cv-1135) (AL, AK, AZ, CA, DC, IA, KS, ME, MI, MN, MS, NE, NV, NM, NY, NC, ND, OR, SD, UT, VT, WV, WI and WY)

SEIU Pension Plans Master Trust v. Bank of Am. Corp. (13-cv-1456) (federal)

Amabile v. Bank of Am. Corp. (13-cv-1700) (federal)

Fed. Home Lo[illegible] Mortg. Corp. v. Bank of Am. Corp. (13-cv-3952) (federal)

Regents of the Univ. of Cal. v. Bank of Am. Corp. (13-cv-5186) (federal; CA)

Cnty. of Sonoma v. Bank of Am. Corp. (13-cv-5187) (federal; CA)

San Diego Ass'n of Gov'ts v. Bank of Am. Corp. (13-cv-5221) (federal; CA)

Cnty. Of Sacramento v. Bank of Am. Corp. (13-cv-5569) (federal; CA)

City of Houston v. Bank of Am. Corp. (13-cv-5616) (federal; TX)

Principal Funds, Inc. v. Bank of Am. Corp. (13-cv-6013) (federal; IA)

Principal Fin. Grp., Inc. v. Bank of Am. Corp. (13-cv-6014) (federal; IA)

City of Phila. v. Bank of Am. Corp. (13-cv-6020) (federal)

Nat'l Credit Union Admin. Bd. v. Credit Suisse Grp. AG (13-cv-7394) (federal; CA, IL and KS)

Cnty. of Mendocino v. Bank of Am. Corp. (13-cv-8644) (federal; CA)

Fed. Deposit Ins. Corp. v. Bank of Am. Corp. (14-cv-1757) (federal; NY)

Bay Area Toll Auth. v. Bank of Am. Corp. (14-cv-3094) (federal; CA)

Prudential Inv. Portfolios 2 v. Bank of Am. Corp. (14-cv-4189) (federal)

SCHEDULE B

Federal and state RICO claims

Charles Schwab, N.A. v. Bank of Am. Corp.; Schwab Money Market Fund, v. Bank of Am. Corp.; Schwab Short-Term Bond Market Fund v. Bank of Am. Corp. (11-cv-6409; 11-cv-6411; 11-cv-6412) (federal)

Adams v. Bank of Am. Corp. (12-cv-7461) (federal)

L.A. Cnty. Emps. Ret. Ass'n v. Bank of Am. Corp. (13-cv-0398) (federal)

Payne v. Bank of Am. Corp. (13-cv-0598) (federal)

Cnty. of Riverside v. Bank of Am. Corp. (13-cv-1135) (federal)

Bay Area Toll Auth. v. Bank of Am. Corp. (14-cv-3094) (federal)

Prudential Inv. Portfolios 2 v. Bank of Am. Corp. (14-cv-4189) (NJ)

[Letter to Judge Naomi Reice Buchwald on behalf of FDIC and Freddie Mac. MDL Docket No. 616; Aug. 20, 2014]

[Dickstein Shapiro LLP Letterhead]

August 20, 2014

Via Hand Delivery and ECF

The Honorable Naomi Reice Buchwald
United States District Court Judge
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Re *In re LIBOR-Based Financial Instruments Antitrust Litigation*,
Master File No. 1:11-md-02262-NRB – Antitrust

Dear Judge Buchwald:

Dickstein Shapiro LLP represents plaintiffs the Federal Deposit Insurance Corporation as Receiver for 38 closed banks (collectively, the "FDIC-R") and the Federal Home Loan Mortgage Corporation ("Freddie Mac"). This letter responds to Defendant' pre-motion letter asserting that antitrust claims in all stayed actions should be summarily dismissed based on the Court's prior rulings in other cases (MDL Doc. 594).

This Court should decline Defendants' request for summary dismissal. Defendants wrongly assert that the Complaints rest solely on the same "core theory" previously argued in *LIBOR I* and *LIBOR II*[1]—that Defendants restrained competition by conspiring to make false LIBOR submissions to the British Bankers Association ("BBA"). Defendants' assertion is not correct. Freddie Mac's amended complaint, filed after the *LIBOR I* decision, alleges agreements, relevant markets, and harms to competition that materially differ from those addressed in *LIBOR I* or in *LIBOR II*. The FDIC-R's complaint, filed after *LIBOR I* and *LIBOR II*, alleges generally similar facts and antitrust theories (together, the "Complaints").

These additional allegations support a different result than *LIBOR I* or *LIBOR II*, and include: broader sets of conspirators and agreements;[2] additional anticompetitive effects in other defined markets; facts showing that the agreements constituted an unreasonable restraint of trade under a

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[1] See generally In re LIBOR-Based Financial Instruments Antitrust Litig., No. 1:11-md-02262-NRB, 935 F.Supp.2d 666, DL Doc. 286 (S.D.N.Y. 2013) ("LIBOR I"); In re LIBOR-Based Financial Instruments Antitrust Litig., No. 1:11-md-02262-NRB, 962 F.Supp.2d 606, MDL Doc 389 (S.D.N.Y. 2013) ("LIBOR II").

[2] The Complaints allege that the Panel Banks agreed among themselves *and with the BBA* (a Defendant) to publish artificially low LIBORs *and* to misrepresent LIBOR as a reliable benchmark for short-term interest rates. *Fed. Home Loan Mortg. Corp v. Bank of Am. Corp.*, No. 1:13-cv-03952-NRB, Am. Compl. ¶¶ 114-118 (S.D.N.Y. July 22, 2013) (Doc. 25) ("Freddie Mac Compl."); *FDIC v. Bank of Am. Corp.*, No. 1:14-cv-01757-NRB, Compl. ¶¶ 320-328 (S.D.N.Y. Mar. 14, 2014) (Doc. 2) ("FDIC-R Compl.").

rule-of-reason analysis, and not merely *per se* violations;[3] and that the alleged injuries arose, not only from the fraudulent statements, but from adverse effects on the competitive process.

For example, the Complaints allege that the agreements discouraged innovation and effectively excluded competitors from the market for short-term interest rate benchmarks. Freddie Mac Compl. ¶¶ 4-5, 8, 114, 123; FDIC-R Compl. ¶¶ 320-321, 323, 327, 333. Absent collusion, Defendants would have had to compete on the merits to maintain LIBOR's position as the dominant benchmark.[4] *Id.* Indeed, after the agreements were discovered in 2012, competition led to significant reforms to LIBOR. Freddie Mac Compl. ¶ 123: FDIC-R Compl. ¶ 333. These anticompetitive

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[3] Restraints that do not fit within the *per se* rule are analyzed under the rule of reason, in which the essential inquiry is whether or not the challenged agreement enhances competition in a particular market. *NCAA v. Bd. of Regents of Okla.*, 468 U.S. 85, 104 (1984). Even if an agreement was made as part of a cooperative process, the trier-of-fact must still determine the agreement's effect on price, quality, service, and/or innovation. *Id.* at 104-05 & n.28. The over-the-counter class proposed to include five rule-of-reason allegations in an amended complaint, but those limited allegations were materially different than the allegations in the Complaints and not addressed in *LIBOR II*.

[4] Agreements that tend to exclude potential competitors are often deemed antitrust violations. *See, e.g., Associated Press v. United States*, 326 U.S. 1, 13-14 (1945) ("Trade restraints of this character, aimed at the destruction of competition, tend to block the initiative which brings newcomers into a field of business and to frustrate the free enterprise system which it was the purpose of the Sherman Act to protect."); *Klickads, Inc. v. Real Estate Bd. of NY, Inc.*, No. 04 Civ. 8024 (LBS) 2007 WL 2254721, at *9 (S.D.N.Y. Aug. 6, 2007).

effects injured market participants like Freddie Mac and the FDIC-R by depriving them of a reliable benchmark. Freddie Mac Compl. ¶¶ 5, 96, 123, 126; FDIC-R Compl. ¶¶ 323, 333, 336.

In addition, the Complaints allege that the Panel Banks competed for cash, not only in the London interbank loan submarket, but also against Panel and non-Panel Banks in various other submarkets (e.g., commercial paper, repos, sale of asset-backed securities). Freddie Mac Compl. ¶¶ 2-8, 38-39, 89, 124, 139-140; FDIC-R Compl. ¶¶ 321-322, 324. The Complaints allege that the collusive agreements harmed competition markets for cash by distorting the perceived supply/demand balance of money, reducing transparency, and increasing transaction costs. Freddie Mac Compl. ¶¶ 4, 88-89; FDIC-R Compl. ¶¶ 329-332, 334. Economic theory recognizes that disclosure of accurate information enhances efficiency and promotes competition, especially in financial markets. Freddie Mac Compl. ¶¶ 3-4, 120; FDIC-R Compl. ¶ 332.[5] Absent collusion, the Panel Banks would have to have competed for cash on the merits by providing better products and prices. Freddie Mac Compl. ¶¶ 3, 89, 120, 122; FDIC-R Compl. ¶¶ 76, 321, 330, 332. These harms to the competitive process injured market participants like Freddie Mac and the FDIC-R by depriving them of accurate information regarding the prices of securities and the underlying

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[5] *See also In re High-Tech Employee Antitrust Litig.*, 289 F.R.D. 555, 568-70 (N.D. Cal. 2013) (agreements that impair price-discovery process can harm competition and cause antitrust injury).

demand and supply factors, and injecting false information into negotiations for the products they purchased and sold. Freddie Mac Compl. ¶¶ 90, 96, 120, 126; FDIC-R Compl. ¶¶ 330, 336.

Likewise, the Complaints allege that the agreements impaired the ability of non-Panel Banks to compete against the Panel Banks in the markets for LIBOR-based products because non-Panel Banks priced LIBOR-based products on the expectation that competitive market forces, not collusion, would determine short-term interest rates. Freddie Mac Compl. ¶¶ 4, 52, 55-59, 121; FDIC-R Compl. ¶¶ 322, 330-331, 333-334. The Complaints allege that the agreements were expressly forward-looking and therefore interfered with the competitive process by which counterparties negotiated prices for swap contracts and LIBOR-based derivatives. Freddie Mac Compl. ¶¶ 4, 90, 121; FDIC-R Compl. ¶¶ 75-77, 322, 330-331.[6] At a minimum, these additional allegations justify a different result than in *LIBOR I* and *LIBOR II*.

Defendants acknowledge that the Complaints allege facts that were not set forth in the complaints at issue in *LIBOR I* and *LIBOR II*. Moreover, several recent developments, not all of which can be listed here, support the Complaints' allegations. The European Commission ("EC"), for example, found that agreements among Panel Banks harmed competition in other LIBOR-based markets. EC Vice President

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[6] *See, e.g., Nat'l Soc'y of Prof Eng'rs v. United States*, 435 U.S. 679, 692-94 (1978) (conduct that interfered with setting of prices by free market forces harmed competition).

Joaquin Alumina called "the *collusion* between banks who are supposed to be *competing* with each other" "shocking," adding that "[h]ealthy *competition* and transparency are crucial for financial markets wo work properly."[7] In addition, Lloyds recently admitted that it systematically suppressed its LIBOR submissions to obtain short-term funding at artificially low rates—in the London interbank loan market and all other cash markets. *See, e.g., In re Lloyds Banking Grp. plc*, No. 14-18, 2014 WL 3783951, at *3 (C.F.T.C. July 28, 2014) (LIBOR is used as "a gauge of the market's expectation of future central bank interest rates"); *id.* at *11 (accurate submissions "could potentially create an issue with buyers of our paper"); *id.* at *12 (company directive not to "make bids for cash in the market above the rate of the daily LIBOR fixing"); *id.* (LIBOR suppression preserved Lloyds' ability to raise funds from other market participants at suppressed prices).[8]

In addition to the Complaints' articulation of claims and theories not present in *LIBOR I* or *LIBOR II*, dismissal of the Complaints would deprive Freddie Mac and the FDIC-R of their rights to preserve their claims against the risk of waiver. While MDL

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[7] Antitrust: Commission fines banks €1.71 billion for participating in cartels in the interest rate derivatives industry, European Commission (Dec. 4, 2013), http://europa.eu/rapid/press-release_IP-13-1208_en.htm (emphasis added).

[8] In the event that this Court authorizes amendments to complaints, Freddie Mac and the FDIC-R would amend their complaints to include these recent developments in the context of *per se* and rule-of-reason allegations.

proceedings facilitate coordination of cases for pretrial purposes, each plaintiff continues to litigate its own claims.[9] Consequently, MDL litigants must press any "meaningfully different" arguments or those arguments may be waived. *See Sompo Japan Ins. Co. of Ame. v. Norfolk S. Ry Co.*, – F.3d –, 2014 WL 3844155, at *19 (2d Cir. Aug. 6, 2014). For example, some courts have held that an antitrust plaintiff waived rule-of-reason arguments by pressing only *per se* theories. *See Nova Designs, Inc. v. Scuba Retailers Ass'n*, 202 F.3d 1088, 1090-91 (9th Cir. 2000).

Accordingly, Freddie Mac and the FDIC-R respectfully request the opportunity to brief and orally argue these additional allegations and theories either in opposition to motions to dismiss or, if the Court would prefer, in response to an Order to Show Cause.

Respectfully submitted,

Richard J. Leveridge
James R. Martin
Jennifer D. Hackett
DICKSTEIN SHAPIRO LLP
(202) 420-4778 direct dial
(202) 379-9325 direct fax

cc: All Counsel of Record (via ECF)

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[9] *See, e.g., In re Brand Name Prescription Drugs Antitrust Litig.*, 115 F.3d 456,457 (7th Cir. 1997) (opt-outs could not appeal summary judgment against class because opt-outs were not parties and therefore not bound by judgment).

[Letter to Judge Naomi Reice Buchwald on behalf of Schwab Plaintiffs. MDL Docket No. 619; Aug. 20, 2014]

[Lieff Cabraser Heimann & Bernstein, LLP Letterhead]

August 20, 2014

VIA ECF AND HAND DELIVERY

The Honorable Naomi Reice Buchwald
United States District Judge
500 Pearl Street
New York, NY 10007

Re: *In re LIBOR-Based Financial Instruments Antitrust Litigation*, Master File No. 1:11-md-2262-NRB; Case Nos. 13-cv-7005, 14-cv-3094

Dear Judge Buchwald:

We write on behalf of the Schwab plaintiffs (collectively, "Schwab") and plaintiff Bay Area Toll Authority ("BATA," and with Schwab, "Plaintiffs") in response to Defendants' August 13, 2014 letters regarding their anticipated motions to dismiss. Plaintiffs agree that full briefing will ultimately be warranted to address Defendants' numerous arguments. Further, as discussed in a separate letter being filed today on behalf of all "direct action" plaintiffs, Schwab and BATA intend to amend their Complaints as of right. While Plaintiffs dispute that

any of their claims are deficient, those amendments may obviate, at least to some extent, Defendants' motions. Accordingly, rather than provide a point-by-point rebuttal to Defendants' letters, we summarize here Plaintiffs' initial responses to Defendants' primary arguments.[1]

I. Procedural Background

In August 2011, Schwab filed three substantively identical non-class actions in the Northern District of California (the "Initial Schwab Actions"), asserting claims arising from Defendants' unlawful suppression of U.S.-Dollar LIBOR during the period August 2007 to May 2010. In September 2011, those cases were transferred to this Court for pretrial purposes in accordance with 28 U.S.C. § 1407 (Nos. 11-cv-6409, 11-cv-6411, and 11-cv-6412). The operative complaints, filed on April 30, 2012, included claims against Defendants for violations of the Sherman Act, RICO, and California's Cartwright Act, as well as claims under California common law for interference with economic advantage, breach of the implied covenant of good faith and fair dealing, and unjust enrichment. By its Order of March 29, 2013, the Court, *inter alia*, dismissed Schwab's antitrust and RICO claims with prejudice and declined to exercise supplemental jurisdiction over Schwab's common-law claims. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 935 F. Supp. 2d 666, 685-95, 724-36 (S.D.N.Y. 2013) ("*LIBOR I*").

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[1] Plaintiffs reserve their right to raise additional arguments in opposing Defendants' motions.

Following the Court's ruling, Schwab filed its present action in San Francisco Superior Court on April 29, 2013 (the "Schwab California Action").[2] The Complaint includes (i) claims over which this Court declined to exercise supplemental jurisdiction, i.e., interference with prospective economic advantage, breach of the implied covenant of good faith and fair dealing, and unjust enrichment; and (ii) claims for fraud and rescission of contract, as well as for violations of California's unfair competition law (Cal. Bus. & Prof. Code § 17200 ("UCL Section 17200")), California's securities laws (Cal. Corp. Code §§ 25400 & 25401), and Sections 11, 12(a)(2), and 15 of the Securities Act of 1933 ("Securities Act"). Schwab further alleges that Defendants expressly or tacitly conspired to suppress LIBOR, and thus each Defendant is being sued both individually—as a primary violator of the law—and as a co- conspirator under California law. Schwab Compl. ¶¶ 50-257, 320-24. Defendants removed the Schwab California Action to the Northern District of California and then moved to transfer the case to this Court, which Schwab opposed. On October 2, 2013, the Judicial Panel on Multidistrict Litigation ("JPML") ordered the case

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[2] Schwab also filed a notice of appeal with respect to its antitrust and RICO claims, but the Second Circuit *sua sponte* dismissed the appeal for lack of appellate jurisdiction, reasoning that this Court's order was not "final" under 28 U.S.C. § 1291. The U.S. Supreme Court is expected to address this issue in *Gelboim v. Bank of America Corp.*, No. 13-1174.

transferred, and on December 27, 2013, this Court denied Schwab's motion to remand.

On March 31, 2014, BATA filed an action in the Northern District of California, asserting Sherman Act, RICO, and Cartwright Act claims as well as claims under California law for fraud, interference with prospective economic advantage, breach of contract, unjust enrichment, and violation of UCL Section 17200. BATA also alleges, under California law, that Defendants conspired to suppress LIBOR. BATA Compl. ¶¶ 40-252, 288-92. On May 1, 2014, the JPML ordered BATA's case transferred to this Court.

II. Claim-Specific Arguments[3]

A. Sherman Act, Cartwright Act, and RICO Claims (BATA)

While BATA respectfully disagrees with the Court's rulings regarding antitrust injury, the "RICO Amendment" of the Private Securities Litigation Reform Act, and RICO extraterritoriality, we expect the Court is not inclined to reconsider them. At the same time, BATA wishes to preserve its appellate rights. Accordingly, if the Court determines to apply its prior rulings to BATA's claims, BATA will file an appeal.

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[3] Schwab and BATA join the arguments in the letter being submitted today by Richard Leveridge of Dickstein Shapiro LLP addressing Defendants' personal-jurisdiction arguments. Further, by not raising a personal-jurisdiction defense in the Initial Schwab Actions, Defendants have waived or forfeited any such defense regarding California.

B. Contract and Unjust-Enrichment Claims (Schwab and BATA)

Defendants intend to move to dismiss Schwab's claims for breach of the implied covenant of good faith and fair dealing and for rescission of contract, to the extent those claims are asserted against Defendants with which Schwab "did not transact, based on the Court's rulings to date." Dkt. No. 594, at 1. BATA asserts claims for breach of contract against Bank of America, Citibank, and JPMorgan Chase & Co. based on interest-rate swaps BATA entered into with those counterparties. Defendants do not seek to dismiss those claims. *See* Dkt. No. 594, at 1, 3, 7-9 (BATA not included among cases in which Defendants will move to dismiss).

Regarding Schwab's contract claims, Defendants fail to specify what they consider a "stranger" Defendant. Nor do the Court's prior rulings address the circumstance where, as in the Schwab California Action, plaintiffs transacted with broker-dealer affiliates of LIBOR Panel Banks (in addition to transacting directly with certain Panel Banks). Among Schwab's transactions, for example, are those in which Schwab purchased LIBOR-based financial instruments from broker-dealer affiliates of Panel Banks that issued the instruments. Further, even were the Court to determine that a contract claim cannot lie against a Panel Bank Defendant with respect to Schwab's purchases of LIBOR-based instruments from the Panel Bank's affiliate, Schwab's unjust-enrichment claims would be unaffected. *See Process Specialties, Inc. v. Sematech, Inc.*, No. CIV. S-00414 FCD PAN, 2001 U.S. Dist. LEXIS 26261, at *63 (E.D. Cal. Nov. 8, 2001) ("there is no such [privity]

requirement under California law" with respect to unjust enrichment).

C. Fraud (Schwab and BATA)

Plaintiffs' claims are, contrary to Defendants' contention, timely. Plaintiffs respectfully disagree with the Court's determination that by May 2008, "a person of ordinary intelligence would clearly have been on notice that LIBOR was probably being set at artificial levels" (*LIBOR I*, 935 F. Supp. 2d at 705). Indeed, Barclays recently "conceded" that its June 2012 settlement with the government constituted "the (first) occasion that Barclays disclosed its false 2007-2009 [LIBOR] submission rates." *Carpenters Pension Trust Fund of St. Louis v. Barclays PLC*, 750 F.3d 227, 233 (2d Cir. 2014).

Even assuming *arguendo* the Court's inquiry-notice ruling with respect to claims under the Commodity Exchange Act comports with the high threshold California law imposes for dismissal,[4] those claims have been equitably tolled from the date a putative class complaint encompassing claims substantially similar to Plaintiffs' claims, including the Over-the-Counter Plaintiffs' August 5, 2011 class complaint, was filed. California's equitable-tolling doctrine serves "to toll the statute of limitations in

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[4] *See Broberg v. Guardian Life Ins. Co. of Am.*, 171 Cal. App. 4th 912, 921 (2009) ("When a plaintiff reasonably should have discovered facts for purposes of the accrual of a cause of action or application of the delayed discovery rule is generally a question of fact, properly decided as a matter of law only if . . . the allegations in the complaint and facts properly subject to judicial notice[] can support only one reasonable conclusion.").

favor of a plaintiff who acted in good faith where the defendant is not prejudiced by having to defend against a second action." *Hatfield v. Halifax PLC*, 564 F.3d 1177, 1188 (9th Cir. 2009). Because this form of tolling "covers situations beyond those covered by *American Pipe*" (*id.*), it is irrelevant whether a California court would recognize "cross-jurisdictional tolling" under *American Pipe* (*see* Dkt. No. 595, at 1 n.2).[5]

Defendants' argument that Plaintiffs "fail to plausibly allege that any purported reliance was reasonable or justified" (Dkt. No. 595, at 2) also lacks merit. Whether reliance on a misstatement or omission was reasonable "is a question of fact for the jury, and may be decided as a matter of law only if the facts permit reasonable minds to come to just one conclusion." *Broberg*, 171 Cal. App. 4th at 921 (citation and internal quotation marks omitted). Further, this Court has held that if the offering materials for LIBOR-based financial instruments "described how LIBOR was calculated by reference to the 'proper' procedures rather than the manipulation that allegedly was occurring," they "would contain a material misrepresentation," and if those materials "did not describe how LIBOR was calculated," they "would still be omitting that LIBOR was being

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[5] As Defendants effectively concede (*see* Dkt. No. 596, at 2 n.4), the statutes of limitations for Schwab's claims for breach of the implied covenant of good faith and fair dealing, interference with prospective economic advantage, and unjust enrichment were tolled during the pendency of the Initial Schwab Actions. *See* 28 U.S.C. § 1367(d).

manipulated, surely a material omission." *LIBOR I*, 935 F. Supp. 2d at 728. Accordingly, Defendants' reliance on this Court's statement that "'no one bank could possibly guarantee that a particular LIBOR fix was determined in a manner that wholly complied with the BBA's rules'"[6] misses the point. This is particularly so given Plaintiffs' allegations that Defendants conspired to suppress LIBOR.[7]

D. Conspiracy (Schwab and BATA)

Defendants' contention that BATA has not "pleaded claims for civil conspiracy at all" disregards that "[c]onspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." *Applied Equip. Corp. v. Litton Saudi Arabia Ltd.*, 869 P.2d 454, 457 (Cal. 1994). Further, Plaintiffs have plausibly alleged a

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[6] Dkt. No. 595, at 2 (quoting *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 962 F. Supp. 2d 606, 631 n.31 (S.D.N.Y. 2013) ("*LIBOR II*")).

[7] Defendants' vague assertion that "certain Plaintiffs" fail to sufficiently allege "intent on the part of Defendants to induce reliance on any allegedly fraudulent conduct" (Dkt. No. 595, at 2) is likewise unavailing. *See, e.g.*, Schwab Compl. ¶ 59 (alleging Defendants' motive to pay lower interest rates on LIBOR-based financial instruments); BATA Compl. ¶ 49 (same); *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MD 2262 (NRB), 2014 U.S. Dist. LEXIS 86765, at *76-77 (S.D.N.Y. June 23, 2014) ("*LIBOR III*") (holding that Exchange-Based Plaintiffs sufficiently pled scienter). Plaintiffs also plead proximate causation, as they would not "have suffered the alleged damage even in the absence of the fraudulent inducement." *Beckwith v. Dahl*, 205 Cal. App. 4th 1039, 1064 (2012).

conspiracy. *See* Schwab Compl. ¶¶ 50-257, 320-24; BATA Compl. ¶¶ 40-252, 288-92.

E. Interference with Prospective Economic Advantage (Schwab and BATA)[8]

Defendants incorrectly assert that Plaintiffs' claims for interference with prospective economic advantage are legally deficient because Plaintiffs fail to identify the business relationships Defendants disrupted and do not plausibly allege that Defendants intentionally interfered with those relationships. Among other things, with respect to Plaintiffs' transactions with Defendants' broker-dealer affiliates, the Court reasonably can infer at the pleading stage that Defendants knew of those business relationships. *See Eldorado Stone, LLC v. Renaissance Stone, Inc.*, No. 04cv2562 JM (LSP), 2005 U.S. Dist. LEXIS 45237, at *14 (S.D. Cal. Aug. 9, 2005) (plaintiffs' allegations "gave rise to an inference" that defendant knew of the relationships at issue). Relatedly, in light of Plaintiffs' well-pled allegations as to Defendants' motives for suppressing LIBOR, their far-reaching acts to further that scheme, and the manifestly foreseeable results of Defendants' actions (lower rates of return on LIBOR-based financial instruments), the Court reasonably can infer that Defendants "acted either with the desire to

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[8] Defendants assert that Plaintiffs' claims for interference with prospective economic advantage and for violation of UCL Section 17200 should be dismissed because, *inter alia*, they are partially or completely time-barred and Plaintiffs do not plead proximate causation. Those arguments fail for the reasons discussed in Section II.C., *supra*.

interfere or the knowledge that interference was certain or substantially certain to occur as a result of [their] action." *Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 957-58 (Cal. 2003).

F. Violation of UCL Section 17200 (Schwab and BATA)

Plaintiffs state claims for violations of UCL Section 17200. In short, contrary to Defendants' assertions, (i) Plaintiffs' claims, which arise from these California-based entities' damages as a result of materials misstatements or omissions disseminated to them by Defendants or their affiliates, are not impermissibly extraterritorial;[9] (ii) Schwab and BATA have statutory standing;[10] and (iii) Plaintiffs plead deception, intent, and reliance (*see* Section II.C., *supra*).[11]

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[9] *See Sullivan v. Oracle Corp.*, 254 P.3d 237, 248 (Cal. 2011) ("Certainly the UCL reaches any unlawful business act or practice committed in California.").

[10] *See* Cal. Bus. & Prof. Code § 17201 (defining "person" to include "corporations, firms, partnerships, joint stock companies, associations and other organizations of persons"); *Notrica v. State Comp. Ins. Fund*, 70 Cal. App. 4th 911, 939-44 (1999) (California's State Compensation Insurance Fund was a "person" under the UCL).

[11] Defendants also assert that UCL Section 17200 claims cannot lie based on securities transactions, and that to the extent choice-of-law provisions provide for the law of a jurisdiction other than California, Plaintiffs cannot state such claims. As to the former argument, "[t]he California courts have expressly held that federal securities laws do not preempt Section 17200 generally." *Strigliabotti v. Franklin Res., Inc.*, No. C 04-00883 SI, 2005 U.S. Dist. LEXIS 9625, at *29 (N.D. Cal. Mar. 7, 2005). At any rate, any such preclusion would not apply to the extent

G. Federal and State Securities Claims (Schwab)

Schwab's securities claims are timely under the *American Pipe* rule or as a result of equitable tolling. *See, e.g.*, *Benfield v. Mocatta Metals Corp.*, 26 F.3d 19, 23 (2d Cir. 1994) (*American Pipe* applied because there was "a sufficient commonality between [defendant]'s alleged acts of commodity wrongdoing and [plaintiff]'s allegation of RICO violations to preclude a claim by [defendant] of unfair surprise"); Section II.C., *supra* (discussing California's equitable-tolling doctrine).[12] Defendants' challenges to the specificity of Plaintiffs' allegations regarding the subject transactions, as well as to Plaintiffs' ability to plead loss causation or damages, are misplaced. *See N.J. Carpenters Health Fund v. Royal Bank of Scot. Grp., PLC*, 709 F.3d 109, 120 (2d Cir. 2013) (non-fraud claims under Sections 11 and 12(a)(2) require "ordinary notice pleading") (citation and internal quotation marks omitted); *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 156 (2d Cir. 2012)

Plaintiffs' claims arise from transactions in non-securities. *See id.* at *30 (assuming *arguendo* claims based on securities transactions are precluded, that "does not encompass all situations where securities are somehow implicated but not purchased or sold"). The choice-of-law question will turn on the specific language of any such choice-of-law provisions.

[12] The U.S. Supreme Court, in *Public Employees' Retirement System of Mississippi v. IndyMac MBS, Inc.*, No. 13-640, is expected to address whether *American Pipe* applies to the Securities Act's three-year time limitation.

("Neither scienter, reliance, nor loss causation is an element of § 11 or § 12(a)(2) claims . . . .").

In light of the foregoing arguments and authorities, Defendants' anticipated motions to dismiss lack merit. At any rate, because Plaintiffs intend to amend their Complaints as of right, Defendants' motions should await the filing of amended pleadings.

Respectfully,

Steven E. Fineman

cc: All Counsel of Record (by ECF)

[Letter to Judge Naomi Reice Buchwald on behalf of City of Philadelphia. MDL Docket No. 621; Aug. 20, 2014]

[Quinn Emanuel Letterhead]

August 20, 2014

ELECTRONICALLY FILED

Honorable Naomi Reice Buchwald
United States District Court
for the Southern District of New York
500 Pearl Street
New York, New York 10007-1312

Re: The City of Philadelphia, et al. v. Bank of America Corp., et al., 2:13-cv-04352 (E.D. Pa.)

Dear Judge Buchwald:

We write on behalf of plaintiffs City of Philadelphia (the "City") and the Pennsylvania Intergovernmental Cooperation Authority ("PICA," and together with the City, the "PA Plaintiffs") in response to letters submitted by the Defendant banks requesting leave to move to dismiss certain claims brought in *In re LIBOR-Based Financial Instruments Antitrust Litigation*, No. 11-md-2262. Defendants' proposed motions are primarily aimed at complaints

distinct from the narrowly focused one brought by the PA Plaintiffs, and those grounds that do purportedly apply are meritless. Should the Court order full briefing of the issues raised by Defendants, we look forward to the opportunity.

The PA Plaintiffs' contract-based claims are timely and well-pleaded. Defendants do not appear to seek dismissal of these claims on the merits, nor a more definite statement, as they do for other complaints,[1] presumably because the PA Plaintiffs assert these claims solely against their contractual counterparties-specifically those Defendants with which the PA Plaintiffs entered directly into ISDA master agreements. Their sole ground for dismissal appears to be that these claims are untimely under Pennsylvania law.

The PA Plaintiffs' claims for breach of contract and breach of the implied covenant of good faith and fair dealing are timely under Pennsylvania's four-year statute of limitations. 42 Pa. Consol. Stat. § 5525(a).[2]

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[1] *See* App. to Defendants' Aug. 13, 2014 Pre-Motion Submissions at 9-10 (ECF No. 593-1, Aug. 13, 2014).

[2] The statutes of limitation discussed herein do not run against PICA. Under Pennsylvania's doctrine of *nullum tempus*, a statute of limitations does not run against the Commonwealth or its agencies unless the statute specificall y provides otherwise (which the applicable statutes do not). *See, e.g., City of Philadelphia v. Lead Indus. Ass'n*, 994 F.2d 112, 118-20 (3d Cir. 1993); *Commonwealth v. J. W Bishop & Co.*, 439 A.2d 101 (Pa. 1981). PICA is a "public authority and instrumentality of the Commonwealth, exercising public powers of the Commonwealth as an agency and instrumentality

Pennsylvania law provides that the limitations period can be suspended by the continuing nature *both* of the PA Plaintiffs' contracts and of Defendants' wrongdoing. *Carbis Walker LLP v. Winner Int'l Inc.*, 2008 WL 4491497, at *39 (Pa. Com. Pl. Aug. 4, 2008) ("(A] continuing contract ... tolls the statute of limitations ... ."*);Mantia v. N Ins. Co. of New York,* 39 Pa. D. & C. 4th 71, 88 (Com. Pl. 1998) ("When a defendant's conduct is continuing in nature, the statute of limitations is tolled while that conduct continues.") (citing *Dellape v. Murray,* 651 A.2d 638, 640 (Pa. Commw. 1994)). Both doctrines operate here to toll the four-year statute of limitations for so long as Defendants' manipulation of LIBOR was continuing. Additionally, the PA Plaintiffs' claims were preserved by the filing of LIBOR-related class-action complaints on behalf of the PA Plaintiffs and other class members, including *Carpenters Pension Fund of W.Va. v. Bank of Am. Corp.,* No. 11-cv-2883 (S.D.N.Y.) on April 27, 2011. *See Miller v. Fed Kemper Ins. Co.,* 352 Pa. Super. 581, 590 (1986).

The PA Plaintiffs' unjust enrichment claims are timely and well-pleaded. Here, again, the PA Plaintiffs assert this claim solely against Defendants with whom they transacted directly, and Defendants seek neither dismissal on the merits nor a more definite statement. Furthermore, the PA Plaintiffs' unjust enrichment claims are timely under Pennsylvania's four-year statute of limitations, *Cole v. Lawrence,* 701 A.2d 987, 989 (Pa. Super. Ct. 1997),

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thereof." 53 P.S. § 12720.201. Consequently, the statutes of limitation discussed herein cannot dispose of PICA's claims.

which as discussed above, was tolled by the continuing nature of the contracts and misconduct at issue, and the filing of class action complaints that expressly encompass these claims.

The PA Plaintiffs' fraud-based claims are timely and well-pleaded. The PA Plaintiffs' fraud-based claims are timely under Pennsylvania's two-year statute of limitations, 42 Pa. Consol. Stat. § 5524(7), which as discussed above was tolled by the continuing nature of Defendants' misconduct, and by the filing of the class-action complaints.

Defendants argue the PA Plaintiffs' reliance was unreasonable. Letter from Jeffrey T. Scott & David R. Gelfand to Hon. Naomi Reice Buchwald, at 2 (ECF No. 595, Aug. 13, 2014) ("Scott & Gelfand Letter"). As we point out in other letters, the scope of that "ask" is breathtaking. Defendants are asking the Court to rule, as a matter of law, that as early as 2007 no reasonable investor could ever have relied on LIBOR, so that every actor in this *multi-trillion-dollar* market was acting irrationally. The disconnect between Defendants' theory, and reality, requires *at least* waiting for discovery on this issue. This is also true with respect to reliance after May 2008 *(i.e.,* after the Court's "inquiry notice" date), given the market's continuing reliance on LIBOR. There is a difference between finding, for the purposes of inquiry notice, that investors arguably should have begun investigating by May 2008, and deeming every market actor (including many governments) to have acted irrationally in relying on LIBOR. *See, e.g., Miller v. Am. Bureau of Shipping, Inc.,* 1998 WL 879674, at *1 (9th Cir. Dec. 16, 1998) (mem.) (reversing dismissal of fraud claims for lack of reasonable reliance based on

plaintiffs being on inquiry notice).

Defendants similarly try to avoid practical realities by arguing they lacked intent to deceive even though they knew that LIBOR was being manipulated. The Court has already rejected that distinction, finding scienter was adequately pleaded under the Commodity Exchange Act. *See LIBOR III*, 2014 WL 2815645, at *14. This makes sense, as "[w]here representations are made to the public at large for the purpose of influencing the action of anyone who may act upon those representations, a common-law cause of action for fraud lies in favor of any individual who acts upon them and is injured thereby." *Young v. Robertshaw Controls Co.*, 481 N.Y.S.2d 891, 893 (3d Dep't 1984). Defendants cannot escape liability for falsifying LIBOR by claiming to have borne no ill will toward any particular investor who would be harmed.

Finally, Defendants also suggest it is unclear how their misconduct harmed certain plaintiffs. Whatever the merit of those arguments to other cases, it defies common sense to apply them to the PA Plaintiffs. As holders of financial instruments on which they were to receive LIBOR-based payments, the PA Plaintiffs felt directly the impact of LIBOR's suppression, as alleged in the Complaint.[3] Determining precisely how much

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[3] In the aiding and abetting and conspiracy context, Defendants assert that they neither knew of, nor substantially assisted each other's misconduct. Scott & Gelfand Letter at 2-3. However, Plaintiff alleges facts showing that Defendants knew of each other's false submissions, assisted this misconduct by suppressing their own submissions, and did so pursuant to a conspiracy among the clique of British Bankers'

less the PA Plaintiffs were paid is simply not a pleading burden. *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 167 (2d Cir. 2012), *cert. denied*, 133 S. Ct. 1624, 185 L. Ed. 2d 576 (U.S. 2013).

The PA Plaintiffs' interference claims are timely and well-pleaded. The PA Plaintiffs' interference claims are timely under Pennsylvania's two-year statute of limitations, *Bender v. McIlhatten*, 360 Pa. Super. 168, 173 (1987), which was suspended (as discussed above) by the continuing nature of both the contracts at issue and Defendants' wrongdoing.[4] Defendants urge the PA Plaintiffs must allege Defendants knew of and "*intended* to interfere with Plaintiffs' contracts or business relations." Letter from Marc J. Gottridge to Hon. Naomi Reice Buchwald at 2-3 (ECF No. 596, Aug. 13, 2014). As discussed above in the context of the PA Plaintiffs' fraud claims, this slices the elements far too finely, as this Court has already held. *LIBOR III*, 2014 WL 2815646, at *14 ("[I]t may suffice for plaintiffs to allege that defendants knowingly engaged in unquestionably illegitimate conduct while fully comprehending the consequences in the market."). Defendants knew the PA Plaintiffs held LIBOR-linked instruments, and that their conduct would impact *every* LIBOR-based instrument. Such knowledge suffices even if Defendants' focus was not on the specific positions on

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Association member banks.

[4] The running of the limitations period was also suspended by the filing of class-action complaints. *See supra* at 2.

the PA Plaintiffs' books. *See Jacobs v. Continuum Health Partners, Inc.*, 776 N.Y.S.2d 279, 280 (2004) ("To state a cause of action for tortious interference with prospective business advantage, it must be alleged that the conduct . . . was undertaken for the sole purpose of harming plaintiff, *or* that such conduct was wrongful or improper independent of the interference allegedly caused thereby.") (emphasis added) (citation omitted).[5]

The PA Plaintiffs merely seek to preserve their rights on the antitrust claim. In response to the antitrust portion of the Letter from Robert Wise to Hon. Naomi Reice Buchwald, at 1 (ECF No. 594, Aug. 13, 2014), and in light of the Court's prior rulings in this area, the PA Plaintiffs are willing to reach an appropriate stipulation with Defendants that would allow dismissal of these claims, as long as the PA Plaintiffs' appellate rights are fully preserved.

Respectfully submitted,

Daniel L. Brockett

cc: All Counsel (via ECF)

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[5] Certain Defendants-including some of this nation's largest banks suggest they are beyond the reach of a Pennsylvania federal court. Letter from Joel Kurtzberg to l-Ion. Naomi Reice Buchwald (ECF No. 600, Aug. 13, 2014). As described in the August 20, 2014letter to the Court from Richard J. Leveridge on this issue, Defendants' contacts with Pennsylvania, including via the LIBOR-linked instruments at issue in this case, amply support Pennsylvania's assertion of specific jurisdiction.

[Letter to Judge Naomi Reice Buchwald on behalf of California Public Entities. MDL Docket No. 622; Aug. 20, 2014]

[Cotchett, Pitre & Mccarthy, LLP Letterhead]

August 20, 2014

VIA HAND DELIVERY AND ECF

Honorable Naomi Reice Buchwald
United States District Judge
Daniel Patrick Moynihan Courthouse
500 Pearl Street
New York, NY 10007-1312

RE: In re LIBOR-based Financial Instruments Antitrust Litigation, 11 MDL 2262 (NRB)

Dear Judge Buchwald:

This letter is filed pursuant to the Court's letter of July 17, 2014 (Docket No. 572) and in response to the letters of Defendants filed on August 13, 2014. (Docket Nos. 593-598).

Cotchett Pitre & McCarthy ("CPM") represents sixteen (16) public entity Plaintiffs in this litigation. These Plaintiffs are as follows: East Bay Municipal Utility District (EBMUD); City of Houston; County of Mendocino; City of Richmond; Richmond Joint Powers

Financing

Authority; Successor Agency to the Richmond Community Redevelopment Agency; City of Riverside; Riverside Public Financing Authority; County of Sacramento; County of San Diego; County of San Mateo; San Mateo County Joint Powers Financing Authority; San Diego Association of Governments (SANDAG); County of Sonoma; David E. Sundstrom, in his official capacity as Treasurer of the County of Sonoma; and The Regents of the University of California.[1] Collectively, these are the referred to

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[1] In certain instances, these Plaintiffs have jointly filed a complaint. Accordingly, while CPM represents sixteen Plaintiffs, these Plaintiffs have filed a total of eleven (11) Complaints, which are as follows: *City of Richmond, eta/. v. Bank of America Corporation, et al.* (No. 3:13-0106) (N.D. Cal.), (No. 1:13-cv-00627) (SDNY); *County of San Mateo, et al. v. Bank of America Corporation, et al.* (No. 3:13-00 I 08) (N.D. Cal.), (No. 1:13-cv-00625) (SDNY); *County of San Diego v. Bank of America Corporation, eta/.* (No. 3:13-00048) (S.D. Cal.), (No. 1:13-cv-00667) (SDNY); *East Bay Municipal Utility District v. Bank of America Corporation, et al.* (No.3:13-0109) (N.D. Cal.), (No. 1:13-cv-00626) (SDNY); *City of Riverside, et al. v. Bank of America Corporation, et al.* (No. 5:13-cv-00062- VAP-SP) (C.D. Cal.), (1:13-cv-00597)(SDNY); *The Regents of the Univ. of California v. Bank of America Corp., et al.* (No. 3:13-cv-02921) (N.D. Cal.), (No 1 :13-cv-05186) (SDNY); *San Diego Assoc. of Governments v. Bank of America Corp., et al.* (No. I:13-cv-01466) (S.D. Cal.), (No. I:13-cv-05221) (SDNY); *County of Sonoma et al v. Bank of America Corp., et al.* (No. I:13-cv-02979) (N.D. Cal.), (No. 1:13-cv-05187) (SDNY); *City of Houston v. Bank of America Corp., et al.* (No.4:13-cv-02149) (S.D. Tex.), (No. 1:13-cv-5616) (SDNY); *County of Sacramento v. Bank of America Corp., et al.* (No. 2:13-cv-01476) (E.D. Cal.), (No. 1:13-cv-05569) (SDNY); *County of Mendocino v. Bank of America*

herein as the "CPM Plaintiffs."[2]

The causes of action asserted by the CPM Plaintiffs include: federal and state antitrust claims, and state law claims for breach of contract; breach of the implied covenant of good faith and fair dealing; unjust enrichment; interference with economic advantage; fraud; and negligent misrepresentation. In their letters of August 13, 2014, the Defendants challenge, raise issues with, and/or contest the viability of each of these causes of action.[3]

The CPM Plaintiffs will address these assertions in substantive opposition papers after motions to dismiss are filed. However, at this juncture, the CPM Plaintiffs, guided by the Court's prior rulings, note their intention to amend their complaints and the claims asserted therein. In particular, while the CPM Plaintiffs have asserted allegations regarding their LIBOR transactions and the counterparties with whom they had dealings, they intend to provide additional specificity regarding these matters. The CPM Plaintiffs believe that the complaints, as

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Corp., et al. (3:13-cv-05278, N.D. Ca.), (No. 1 :13-cv-8644, SDNY).

[2] In an effort to conserve the time and resources of the Court and the parties, rather than submitting sixteen separate letters, the CPM Plaintiffs join in this one omnibus letter.

[3] Defendants also challenge the CPM Plaintiffs' request for injunctive relief. (Docket No. 598 at 1). However, as Defendants note, the CPM Plaintiffs seek injunctive relief not as a freestanding claim but as a form of relief. As this is a question of "relief" rather than a question as to viability of causes of action, the CPM Plaintiffs submit that any inquiry on this issue is premature.

amended, will address the issues raised by Defendants.

Toward that end, the CPM Plaintiffs hereby join in and incorporate by reference the letter submitted today (August 20, 2014) by Richard J. Leveridge of Dickstein Shapiro, LLP, on behalf of the Direct Action Plaintiffs, respectfully requesting a proposed schedule governing the filing of amended complaints and pre-motion letters relating thereto. (Docket No. 610).[4]

Notwithstanding the above, in further response to Defendants' August 13, 2014 letters, the CPM Plaintiffs state as follows:

1. Breach of Contract/Breach of the Implied Covenant of Good Faith and Fair Dealing/Unjust Enrichment

In their letter of August 13, 2014 (Docket No. 594), Defendants, guided by the Court's *LIBOR III* holding, seemingly invite amendment of the complaints writing that "[a] more definite statement under Fed. R. Civ. P. 12(e) is necessary . . . so that defendants and the Court can identify the defendants, if any, against which plaintiffs can state a claim, as well as the contracts or other dealings that would allegedly form the basis for such a claim." In response, the CPM Plaintiffs note their intention to amend their complaints to provide further specificity regarding their LIBOR transactions and the counterparties with whom they had dealings,

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[4] The CPM Plaintiffs also join in the letter filed by the Dickstein Shapiro firm addressing the personal jurisdiction issues raised by the Defendants in their August 13,2014 letter. (Docket No. 601).

which will address head-on the issue raised by Defendants with respect to these claims.[5]

2. Interference with Economic Advantage, Fraud and Negligent Misrepresentation

Defendants argue that the CPM Plaintiffs' claims for interference with economic advantage, fraud and negligent misrepresentation, are time-barred and that Plaintiffs have failed to make out viable claims (either in part or in toto) (Docket Nos. 595, 596).

With respect to the statute of limitations arguments, the CPM Plaintiffs believe that these arguments are premature. While the Court has considered statute of limitations issues with regard to other claims, it has not yet considered a statute of limitations analysis with regard to the state, common-law claims. Accordingly, the CPM Plaintiffs will be prepared to address issues related to the statutes of limitations, in response to the motions to dismiss that it is anticipated Defendants will file.[6]

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[5] *And see Process Specialties, Inc. v. Sematech, Inc.*, No. CIV. S-00414 FCD PAN, 2001 U.S. Dist. LEXIS 26261, at *63 (E.D. Cal. Nov. 8, 2001) ("there is no such [privity] requirement under California law" with respect to unjust enrichment).

[6] In addition, the CPM Plaintiffs join other plaintiffs in noting that Defendants are incorrect in asserting that New York law applies to all state law claims and the timeliness thereof. Fifteen of the sixteen CPM Plaintiffs are California entities, and one is a Texas entity. Accordingly, the law of California and Texas will govern these entities' state law claims. *See, e.g., In re Lou Levy & Sons Fashions, Inc., Litigation*, MDL No. 856, No. 90 Civ. 0238 (TPG), 1991 U.S. Dist. LEXIS 16576 at *5-6 (S.D.N.Y. Nov. 15, 1991), *reaff'd on reconsideration, 185* F. Supp. 1163 (S.D.N.Y. 1992) *aff'd*, 988

As to the substance of the fraud claims, Defendants' arguments also are misplaced. Defendants argue that the CPM Plaintiffs' reliance upon Defendants was unjustified (Docket No. 595). As an initial matter, the CPM Plaintiffs note that the issue of whether reliance on a misstatement or omission was reasonable "is a question of fact for the jury, and may be decided as a matter of law only if the facts permit reasonable minds to come to just one conclusion." *Broberg v. Guardian Life Ins. Co. of Am.*, 171 Cal. App. 4th 912, 921 (2009) (citation and internal quotation marks omitted); *see Jones v. Ray Ins. Agency*, 59 S.W.3d 739, 754 (Tex. App. 2001) ("ordinarily the issue of reliance in a fraud case is a question of fact") (citation omitted); *pet. for review denied, Ray Ins. Agency v. Jones*, 92 S.W.3d 530 (Tex. 2002). Moreover, and perhaps more to the point, the notion that reliance by plaintiffs was unjustified strains credulity. At best, Defendants' arguments only serve to underscore that motions to dismiss are premature and that discovery on this issue is needed.[7]

F.2d 311 (2d Cir. 1993) ("In multidistrict litigation transfers, the law of the transferor district must be applied."). Similarly, questions of choice of law are to be decided under the law of the transferor court. *Anschutz Corp.* v. *Merrill Lynch & Co., Inc.*, 690 F.3d 98, 112 (2d Cir. 2012).

[7] The notion that Defendants did not intend to induce reliance is similarly unfounded. Nevertheless, and without conceding this point, it is anticipated that the amendments to the CPM Plaintiffs' complaints, which will provide additional detail about the CPM Plaintiffs' dealings with counterparties, will serve to underscore how Defendants intended to induce reliance in specific instances. Likewise, and without conceding

Given the breadth and depth of the allegations about the Defendants' wrongful conduct regarding the LIBOR market and the foreseeability of the consequences thereof, they cannot now assert that they did not know of CPM Plaintiffs' dealings and intend to interfere in CPM Plaintiffs' dealings. At a minimum, an inference must be drawn that they conducted themselves with knowledge that interference was likely. *See Korea Supply Co. v. Lockheed Martin Corp.*, 63 P.3d 937, 957-58 (Cal. 2003).

3. Antitrust Claims

With respect to the issues raised by Defendants in their August 13, 2014 letter (Docket No. 594) relating to the antitrust claims, and guided by the Court's prior rulings concerning these matters, the CPM Plaintiffs submit that they are prepared to work with Defendants to see if the parties can reach an appropriate stipulation regarding these claims so long as the CPM Plaintiffs' appellate rights are fully preserved.

Respectfully submitted,

s/Alexander Barnett

Cc: All Counsel of Record (via ECF)

Defendants' challenge to CPM Plaintiffs' negligent misrepresentation claims on grounds that the complaints fail to establish a "requisite relationship" between Defendants and the CPM Plaintiffs, any such arguments will fall away with amendments regarding dealings with specific counterparties.

[Letter to Judge Naomi Reice Buchwald on behalf of Prudential Investment Portfolios MDL Docket No. 624; Aug. 20, 2014]

[Quinn Emanuel Letterhead]

August 20, 2014

ELECTRONICALLY FILED

Honorable Naomi Reice Buchwald
United States District Court
for the Southern District of New York
500 Pearl Street
New York, New York 10007-1312

Re: *Prudential Investment Portfolios 2 & Prudential Core Taxable Money Market Fund v.Bank of America Corporation, et al.*, 1:14-cv-04189-NRB (S.D.N.Y.)

Dear Judge Buchwald:

We write on behalf of plaintiff ("Prudential") in response to the letters submitted by the Defendant banks requesting leave to file motions to dismiss certain claims brought in *In re LIBOR-Based Financial Instruments Antitrust Litigation*, No. 1 1-md-2262. As explained below, Defendants' proposed motions are primarily aimed at complaints distinct from the narrowly y focused one brought on behalf of the two Prudential funds in this case, and those grounds that do purportedly apply are meritless.

Should the Court believe that full briefing is necessary to resolve the issues raised by the Defendants, we look forward to the opportunity to do so.

Amending the Complaint. Initially, we note that Defendants do not challenge large portions of Prudential's Complaint. Indeed, they concede that Prudential's breach of contract and unjust enrichment claims, asserted as to Defendant counterparties and governed by New Jersey's six-year statute of limitations, are controlled by this Court's ruling in *In re LIBOR-Based Fin. Instruments Antitrust Litig. ("LIBOR III")*, 2014 WL 2815645, at *20 (S.D.N.Y. June 23, 2014). However, to address concerns expressed in the Court's opinions and other issues raised in the Defendants' letters, Prudential intends to amend its Complaint in accordance with the schedule proposed in the letter from Richard J. Leveridge to the Court on August 20, 2014. We think any briefing schedule on a motion to dismiss should take into account that amendment, which will be filed on or before the jointly proposed deadline.

New Jersey law governs the timeliness of all Prudential's claims. For the timeliness analysis for various claims, Defendants refer to New York law. But Prudential is headquartered in and filed this case in *New Jersey*. It is settled that the law of the transferor jurisdiction continues to govern on all state-law issues. *See, e.g., Anschutz Corp. v. Merrill Lynch & Co., Inc.*, 690 F.3d 98, 112 (2d Cir. 2012); *In re Lou Levy & Sons Fashions, Inc.*, 1991 WL 254428, at *2 (S.D.N.Y. Nov. 15, 1991), *on reconsideration*, 785 F. Supp. 1163 (S.D.N.Y. 1992) *aff'd*, 988 F.2d 311 (2d Cir. 1993). Thus, neither New York's choice-of-law analysis nor C.P.L.R. § 202 applies to Prudential's

Complaint. Under New Jersey's "most significant relationship" test, it is New Jersey-where Prudential received the misrepresentations, relied on them, formed the contracts at issue, and suffered the injury complained of-whose law applies. The application of New Jersey law moots most (if not all) challenges on the timeliness of Prudential's claims.[1]

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[1] The limitations period governing certain of Prudential's claims was also suspended by the filing of class-action complaints that included Prudential as part of the class and asserted causes of action that were substantially similar to, or based on the same facts as, claims Prudential now asserts. "*American Pipe* tolling is properly extended to claims of absent class members that involve the same evidence, memories, and witnesses as were involved in the initial putative class action." *Cullen v. Margiotta*, 811 F.2d 698,719 (2d Cir. 1987) (collecting cases). *See United Airlines, Inc. v. McDonald*, 432 U.S. 385, 393-94 n.14 (1977); *Tosti v. City of Los Angeles*, 754 F.2d 1485, 1489

(9th Cir. 1985) ("[A] related class action gives defendants full notice 'of the need to preserve evidence and witnesses respecting the claims of *all* the members of the class. Tolling the statute of limitations thus creates no potential for unfair surprise .....'") (quoting *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353 (1983)); *Escott v. Barchris Constr. Corp.*, 340 F.2d 731, 734 (2d Cir. 1965) (tolling applies when prior class action "made [defendants] aware of the nature of the evidence that would be needed at trial"), *cert. denied*, 382 U.S. 816 (1965).

Defendants argue in a footnote that *American Pipe* tolling is inapplicable to state-law claims. Letter from Jeffrey T. Scott & David R. Gelfand to Hon. Naomi Reice Buchwald at I n.2, ECF No. 595 (Aug. 13, 2014). But the case Defendants cite states that "[a] federal court evaluating the timeliness of state law claims must look to the law of the relevant state to

Prudential's contract-based claims are timely, and well-pled. Prudential's claims for breach of contract and breach of the implied covenant of good faith and fair dealing are timely under New Jersey's six-year statute of limitations. N.J.S.A. § 2A:14-1. Defendants do not seek dismissal of these claims, nor do they seek a more definitive statement, as they have sought with respect to other complaints. *See* App. to Defendants' August 13, 2014 Pre-Motion Submissions, at 9-10 (ECF No. 593-1). This is likely because Prudential, unlike certain other plaintiffs, asserts its contract claims solely against its contractual counterparties, in conformity with *LIBOR III*.

Prudential's unjust enrichment claims are timely, and well-pled. Prudential's unjust enrichment claims are timely under New Jersey's six-year statute of limitations. *See Jacobson v. Celgene Corp.*, 2010 WL 1492869, at *3 (D.N.J. Apr. 14, 2010). Here, again, Prudential brings claims solely against Defendants with which it transacted directly. Defendants thus do not seek dismissal, or a more definitive statement as to Prudential's claims. *See* App. to Defendants' August 13, 2014 Pre-Motion Submissions at 11-13 (ECF No. 593-1).

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determine ... to what extent, the statute of limitations should be tolled by the filing of a putative class action in another jurisdiction." *In re Bear Stearns Cos. Sec. Derivative & ERISA Litig.*, 2014 WL 463582, at *16 (S.D.N.Y. Feb. 5, 2014). Here, the law of the relevant state, New Jersey, provides that the filing a putative class action in federal court tolls the statute of limitations applicable to class members' state-law claims. *Staub v. Eastman Kodak Co.*, 320 N.J. Super. 34, 58 (App. Div. 1999).

Prudential's fraud-based claims are timely, and well-pled. Prudential's fraud-based claims are also timely under New Jersey's six-year statute of limitations. N.J.S.A. § 2A:14-1.

Defendants argue that Prudential's reliance was unreasonable. Letter from Jeffrey T. Scott & David R. Gelfand to l-Ion. Naomi Reice Buchwald at 2 (ECF No. 595, Aug. 13, 2014) ("Scott & Gelfand Letter"). The scope of that "ask" is breathtaking. Defendants are asking the Court to rule, as a matter of law, that as early as 2007 no reasonable investor could ever have relied on LIBOR. In other words, every actor in this *multitrillion-dollar market* was purportedly acting irrationally. Clearly, the severe disconnect between Defendants' theory, and reality, requires *at least* waiting for discovery on this issue. This is also true with respect to reliance after May 2008 *(i.e.,* after the Court's "inquiry notice" date), given the market's continuing reliance on LIBOR. There is a difference between finding that investors should have begun investigating by May 2008, and deeming every market actor (including many governments) to have acted irrationally in relying on LIBOR. *See, e.g., Miller v. Am. Bureau of Shipping, Inc.,* 1998 WL 879674, at *1 (9th Cir. Dec. 16, 1998) (mem.) (reversing dismissal of fraud claims for lack of reasonable reliance based on plaintiff's being on inquiry notice).

Defendants similarly try to avoid practical realities by arguing that they lacked intent to deceive even though they knew that LIBOR was being manipulated. The Court has already rejected that distinction, finding that scienter was adequately pled under the Commodity Exchange Act. *See LIBOR III,* 2014 WL 2815645, at *14. This makes sense, as

"[w]here representations are made to the public at large for the purpose of influencing the action of anyone who may act upon those representations, a common-law cause of action for fraud lies in favor of any individual who acts upon them and is injured thereby." *Young v. Robertshaw Controls Co.*, 481 N.Y.S.2d 891, 893 (3d Dep't 1984). Defendants cannot escape liability for falsifying LIBOR by claiming they bore no ill will toward any particular investor who would be harmed.

Finally, Defendants question how their misconduct harmed certain plaintiffs. Whatever the merit of those arguments in other cases, it defies common sense to apply them to Prudential. As a holder of instruments on which it was to receive LIBOR-based payments, Prudential was directly impacted by LIBOR's suppression, as alleged in the Complaint. *See McCabe v. Ernst & Young, LLP.*, 494 F.3d 418,438 (3d Cir. 2007) ("'[T]he test of proximate cause is satisfied where . . . conduct is a substantial contributing factor in causing [a] loss.'"). Determining precisely how much less Prudential was paid is simply not a pleading burden. *NECA-IBEW Health & Welfare Fund v. Goldman Sachs & Co.*, 693 F.3d 145, 167 (2d Cir. 2012).[2]

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[2] In the aiding and abetting and conspiracy context, Defendants assert that they neither knew of, nor substantially assisted, each other's misconduct. Scott & Gelfand Letter at 2-3. However, Prudential alleges facts showing that Defendants knew of each other's false submissions, assisted this misconduct by suppressing their own submissions, and did so pursuant to a conspiracy among the LIBOR panel banks.

Prudential's negligent misrepresentation claims are timely, and well-pled. Prudential's negligence claims are timely under New Jersey's six-year statute of limitations. *See Goodman v. Goldman, Sachs & Co.*, 2010 WL 5186180, at *5 (D.N.J. Dec. 14, 2010). Defendants argue that plaintiffs lacked a "'special relationship' with a non-counterparty." Scott & Gelfand Letter at 3. However, Prudential brings negligent misrepresentation claims solely against *counterparty* Defendants. Prudential's claims are also governed by New Jersey law, under which negligent misrepresentation liability "is not limited to special relationship situations." *Highlands Ins. Co. v. Hobbs Grp., LLC*, 373 F.3d 347, 355 (3d Cir. 2004). Rather, New Jersey imposes a duty whenever "called for by good faith and common decency," *id.*, which may extend to the investing public at large. *Id.* at 351 ("[A] defendant may be liable (because it owes a duty) to any reasonably foreseeable recipient who relies on the information.") (internal citation omitted); *see, e.g.*, *Prudential Ins. Co. of Am. v. Credit Suisse Sec. (USA) LLC*, 2013 WL 5467093, at *20 (D.N.J. Sept. 30, 2013); *Prudential Ins. Co. of Am. v. Goldman, Sachs & Co.*, 2013 WL 1431680, at *9 (D.N.J. Apr. 9, 2013). These standards are met here, as Prudential alleges that Defendants knew that Prudential and other investors were relying on LIBOR's integrity.

Prudential's interference claims are timely, and well-pled. Prudential's interference claims are timely under New Jersey's six-year statute of limitations. N.J.S.A. 2A:14-1. Defendants urge that Prudential must allege that Defendants "*intended* to interfere with Plaintiffs' contracts or business relations." Letter from Marc J. Gottridge to Hon. Naomi Reice Buchwald

at 3 (ECF No. 596, Aug. 13, 2014). As discussed above in the context of Prudential's fraud claims, this slices the elements far too finely, as this Court has already held. *See Lightning Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1170 (3d Cir. 1993) ("'[I]f there is no desire at all to accomplish the interference and it is brought about only as a necessary consequence of the conduct of the actor engaged in for an entirely different purpose, his knowledge of this makes the interference intentional.'") (quoting Restatement (Second) of Torts § 767 cmt.d). Defendants also suggest that intent to interfere with these *specific contracts* must be alleged. But Defendants knew that Prudential held LIBOR-linked instruments, and that their conduct would impact *every* LIBOR-based instrument. Such knowledge suffices even if Defendants' focus was not on the specific positions on Prudential's books. *See id.* (finding intentional interference sufficiently alleged as to "a particular category of contracts"); *LIBOR III*, 2014 WL 2815646, at *14 ("[I]t may suffice for plaintiffs to allege that defendants knowingly engaged in unquestionably illegitimate conduct while fully comprehending the consequences in the market."). Here, it would be absurd to require that Defendants have particularized intent to interfere with each one of the hundreds of LIBOR-linked instruments held by Prudential.[3]

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[3] Certain Defendants, including some of this nation's largest banks, say they are beyond the reach of a New Jersey court. Letter from Joel Kurtzberg to Hon. Naomi Reice Buchwald (ECF No. 600, Aug. 13 2014). Prudential expects discovery to show Defendants had continuous and systematic

Prudential's state-Law RICO claim is distinct from the federal claims tire Court previously considered. Defendants do not appear to challenge Prudential's New Jersey RICO claims on timeliness grounds. Nor could they, as such claims are governed by a five-year, if not a six-year, period. *See Jat-wick Dev., Inc. v. Wilf,* No. MRS-C-184-92, slip op. at 8-15 (N.J. Ch. Div. Aug. 13, 2013).[4] Instead, Defendants assert that New Jersey law only "regulates conduct in New Jersey." Letter from Robert F. Wise to Hon. Naomi Reice Buchwald at 2 (ECF No. 594, Aug 13, 2014). Yet New Jersey RICO applies to "crimes under the laws of *any other* jurisdiction," N.J.S.A. § 2C:41-1(a)(l) (emphasis added), and to any "enterprise which engaged in trade or commerce in New Jersey *or affected trade or commerce in New Jersey," State v. Casilla,* 362 N.J. Super. 554, 565-64 (App. Div. 2003) (emphasis added). Thus, "the effects of the defendants' alleged conspiratorial conduct upon stakeholders in this state provide a sufficient basis upon which territorial jurisdiction may be found under" New Jersey RICO. *Bondi v. Citigroup, Inc.,* 2005 WL 975856, at *23 (N.J.

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contact with New Jersey that supp01t general jurisdiction. In any event, as described in the August 20, 2014 letter to the Court from Richard J. Leveridge, Defendants' contacts with New Jersey amply suppott New Jersey's assertion of specific jurisdiction.

[4] We also note that unlike in federal RICO, securities fraud *is* a viable "predicate act" under New Jersey RICO. *See, e.g.,N .J.S.A.2C:41-l(a)(p);Metzv. United Counties Bancorp.,61* F.Supp.2d364,371 (D.N.J.1999). Thus, violations of the New Jersey blue sky law can give rise to RICO liability.

Sup. Ct. Feb. 28, 2005). Defendants' misconduct clearly "affected trade or commerce" in New Jersey, given LIBOR's prevalence as a financial benchmark, including for the instruments at issue here. *See Prudential v. Goldman,* 2013 WL 1431680, at *11 (New Jersey RICO applied based on fact that Prudential's reliance took place in the state). This Court's ruling that federal RICO cannot reach a foreign enterprise does not control the application of New Jersey RICO, which is broader than its federal counterpart.[5]

Respectfully submitted,

Daniel L. Brockett

cc: All Counsel (via ECF)

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[5] In response to the antitrust portion of Mr. Wise's above-cited letter, in Light of the Court's prior rulings in this area, Prudential is willing to attempt to reach an appropriate stipulation with Defendants that would allow dismissal of these claims, as long as Prudential's appellate rights are fully preserved.

[Letter to Judge Naomi Reice Buchwald on behalf of Plaintiffs in stayed class action cases. MDL Docket No. 626; Aug. 20, 2014]

[SUSMAN GODFREY L.L.P. LETTERHEAD]

August 20, 2014

BY HAND AND ECF

The Honorable Naomi Reice Buchwald
United States District Court for the Southern District of New York
United States Courthouse
500 Pearl Street
New York, NY 10007-1312

Re: *In re LIBOR-Based Financial Instruments Antitrust Litigation*, No. 11-md-2262 (NRB)

Dear Judge Buchwald:

We write as liaison counsel for the class cases to communicate the views of counsel in the previously stayed class cases in response to defendants' August 13 pre-motion letters. Counsel in the previously stayed class cases fall into three categories: (1) counsel seeking the creation of new interim classes, appointment of interim lead counsel, and amendment, (2) counsel seeking a stay, and (3) counsel seeking to join the OTC case. Counsel in the OTC and Exchange-

Based cases will also submit separate letters today relating specifically to their cases.

1. Counsel seeking the creation of new interim classes, appointment of interim lead counsel, and amendment

Counsel in cases seeking to represent classes of lenders, homeowners, and students[1] have asked us to communicate their request to seek the creation of new interim classes that do not presently exist, appointment as interim lead counsel for such classes, and the opportunity to file consolidated amended complaints.

Counsel in these cases believe it is appropriate to have a process for appointing interim lead counsel and filing consolidated amended complaints in order to ensure vigorous advocacy of their classes' claims. In addition, counsel note that the Court followed this procedure in the non-stayed class cases. Counsel in these cases propose the following schedule: motions for interim lead counsel filed by September 15, 2014, responses by October 3, 2014, and replies by October 13, 2014; consolidated amended complaints to be filed 30 days after the appointment of interim lead counsel.

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[1] These cases are: *Berkshire Bank v. Bank of Am. Corp. et al.*, 12-cv-5723 (lenders); *Adams v. Bank of Am. Corp. et al.*, 12-cv-7461; *Earle v. Bank of Am. Corp.*, 13-cv-0407; *Payne v. Bank of Am. Corp. et al.*, 13-cv-0598 (homeowners); and *Weglarz et al. v. JP Morgan Chase Bank, N.A. et al.*, 13-cv-1198 and *Nagel v. Bank of America, N.A. and Am. Educ. Servs., Inc.*, 13-cv-3010 (students).

Generally speaking, counsel in these cases seek to amend to add factual allegations to address developments since their cases were stayed, the Court's prior rulings, and issues raised in defendants' pre-motion letters. Attached as Exhibits A through D are letters prepared by counsel in these cases who wished to provide additional detail about their views.

2. Counsel seeking a stay

Counsel in cases seeking to represent classes of owners of various types of LIBOR-based instruments purchased or otherwise acquired from entities other than the LIBOR panel banks[2] have asked us to communicate their request that the Court maintain the existing stay.

The *33-35 Green Pond Road* and *Courtyard at Amwell* cases are putative class actions asserting only Sherman Act claims. Given the Court's prior rulings, counsel in these cases believe the Court will dismiss these claims, which would dismiss these actions in their entirety. However, because of the pending Supreme Court proceedings in *Gelboim v. Bank of America Corp., et al.* (No. 13-1174), it is unclear whether plaintiffs in these cases could appeal immediately after a dismissal or must await the conclusion of litigation as to the remaining cases.

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[2] These cases are: *33-35 Green Pond Road Assocs., LLC v. Bank of Am. Corp. et al.*, 12-cv-5822; *Courtyard at Amwell II, LLC v. Bank of Am. Corp., et al.*, 12-cv-6693; *Lieberman v. Credit Suisse Grp. AG et al.*, 12-cv-6056; *Guaranty Bank & Trust Co. v. Credit Suisse Grp. AG et al.*, 13-cv-0346; *L.A. Cnty. Emps. Ret. Ass'n ("LACERA") v. Bank of Am. Corp. et al.*, 13-cv-0398; and *Cnty. of Riverside v. Bank of Am. Corp. et al.*, 13-cv-1135.

Counsel in these cases therefore respectfully request a stay, which would not interfere with other aspects of this litigation, until *Gelboim* resolves their appellate rights. In the alternative, counsel in these cases respectfully request that the Court enter a Rule 54(b) judgment dismissing these cases so they may be properly appealed.

Counsel in the remaining cases in this category also believe that the outcome of *Gelboim* will likely have a significant effect on their cases because they also assert federal or state antitrust claims. They believe it would be most efficient to maintain the stay in their actions until the *Gelboim* proceedings have concluded. As an alternative, counsel in these cases respectfully request entry of a partial judgment under Rule 54(b) on their Sherman Act and RICO claims, subject to an agreement with defendants preserving their right to appeal and the arguments previously made by other counsel for appellate purposes, and a stay of proceedings on any remaining claims. The dismissal of the Sherman Act and RICO claims would leave a few categories of claims outstanding: state-law antitrust claims (*Lieberman*, *Guaranty Bank & Trust*, *LACERA*, and *County of Riverside*), unjust enrichment (*Lieberman* and *County of Riverside*), tortious interference (*LACERA* and *County of Riverside*), and state unfair business practices (*Guaranty Bank & Trust*). Counsel in these cases respectfully request that the Court maintain the stay as to these remaining claims pending completion of proceedings in *Gelboim*, given the significance of the antitrust claims, to conserve the resources of the Court and the parties.

3. Counsel seeking to join the OTC case

Two of the previously stayed class cases—*SEIU Pension Plans Master Trust v. Bank of America Corp. et al.*, 13-cv-1456 and *Highlander Realty, LLC et al. v. Citizens Bank of Mass. et al.*, 13-cv-2343—plead class definitions involving purchases of LIBOR-based instruments from the panel banks. *SEIU* is brought on behalf of bondholders who bought LIBOR-based instruments directly from one of the panel banks (Compl. ¶¶11, 166), which is part of the OTC class definition.[3]

Highlander Realty is brought on behalf of all borrowers of a subsidiary of panel bank RBS who had a LIBOR rate as an interest benchmark (Compl. ¶ 28), in part including persons who had an interest rate swap agreement based on LIBOR purchased directly from this RBS subsidiary (*see* Compl. ¶ 6)—which is part of the OTC class definition.[4]

Counsel in these cases have informed counsel for the OTC plaintiffs that their clients wish to serve as named plaintiffs and putative class representatives in the OTC action. They therefore respectfully request (and counsel for the OTC plaintiffs join in this request) that counsel for the OTC plaintiffs be permitted to add

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[3] *See* OTC Compl. ¶ 36 ("Non-derivative instruments include but are not limited to floating rate notes. Floating rate notes evidence an amount of money owed to the buyer from the seller. The interest rate on floating rate notes is adjusted at contractually-set intervals and is based on a variable rate index, such as LIBOR. Thus, floating rate notes can be indexed to LIBOR.").

[4] *See* OTC Compl. ¶ 35(f) (discussing interest rate swaps).

the plaintiffs in the *SEIU* and *Highlander Realty* cases as named plaintiffs in the OTC action, after which the *SEIU* and *Highlander Realty* actions may be closed.[5]

Respectfully submitted,

William Christopher Carmody
SUSMAN GODFREY LLP

David Kovel
KIRBY MCINERNEY LLP

Cc: All Counsel (By ECF)

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[5] To the extent that a fuller response on the merits of arguments raised in the pre-motion letters is necessary, counsel in the class cases respectfully incorporate the arguments made in the other responses filed today to the pre-motion letters.

PETITIONER'S BRIEF

No. 13-1174

IN THE

Supreme Court of the United States

ELLEN GELBOIM AND LINDA ZACHER,
INDIVIDUALLY FOR THEMSELVES AND ON BEHALF OF
ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

BANK OF AMERICA CORPORATION ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

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QUESTION PRESENTED

Whether and in what circumstances is the dismissal of an action that has been consolidated with other suits immediately appealable?

PARTIES TO THE PROCEEDINGS BELOW

Pursuant to Rule 14.1(b), the following parties were appellants below and petitioners in this Court:

Ellen Gelboim and Linda Zacher, individually for themselves and on behalf of all others similarly situated

The following parties were appellees below and are respondents in this Court:

Bank of America Corp.

Bank of America, N.A.

Barclays Bank plc

Citibank, N.A.

Citigroup Inc.

Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A.

Credit Suisse Group AG

Deutsche Bank AG

HSBC Holdings plc

HSBC Bank plc

JPMorgan Chase & Co.

JPMorgan Chase Bank, N.A.

Lloyds Banking Group plc

The Norinchukin Bank

Royal Bank of Canada

The Royal Bank of Scotland Group plc

The Bank of Tokyo-Mitsubishi UFJ, Ltd.

UBS AG

WestLB AG (n/k/a Portigon AG)

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BRIEF FOR THE PETITIONERS

Petitioners respectfully request that this Court reverse the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The district court's opinion granting respondents' motion to dismiss petitioners' claim (Pet. App. F) is published at 935 F. Supp. 2d 666. The district court's order denying petitioners leave to amend their complaint (Pet. App. G) is unpublished. The court of appeals' order dismissing petitioners' appeal (Pet. App. A) is unpublished.

JURISDICTION

The court of appeals entered its order dismissing petitioners' appeal (Pet. App. A) on October 30, 2013, and denied petitioners' timely request for reconsideration of that order (Pet. App. B) on December 16, 2013. On March 7, 2014, Justice Ginsburg extended the time to file this petition for certiorari to and including April 15, 2014. App. No. 13A913. The petition for a writ of certiorari was filed on March 26, 2014, and granted on June 30, 2014. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).[1]

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[1] Respondents never challenged this Court's jurisdiction per se, but argued that this case might become moot because the remainder of the LIBOR litigation may be resolved in their favor, such that all parties can appeal under the Second Circuit's precedents. BIO 25-26. As petitioners pointed out in their reply brief, respondents' projections are unrealistic. *See* Cert. Reply 7-8. Subsequent developments in the district court further buttress

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 1291 provides, in relevant part: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . ."

28 U.S.C. § 1407(a) provides, in relevant part:

> When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: Provided, however, That the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

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the claim that the litigation is not going to conclude before the Court has an opportunity to decide this case.

STATEMENT OF THE CASE

1. This civil action arises from a complaint alleging that respondents manipulated the London Interbank Offered Rate (LIBOR), which is the most important benchmark for short-term interest rates in the United States and around the world. LIBOR ostensibly identifies banks' short-term borrowing costs. It is an essential term in countless financial instruments.

The British Bankers Association (BBA) publishes LIBOR every day in ten currencies, including U.S. dollars. Various banks—respondents here—together provided the information that the BBA used to set the U.S. dollar LIBOR. It has been revealed, however, that respondents conspired to manipulate LIBOR by submitting false information. Respondents' collusion suppressed LIBOR, which directly suppressed the payments on LIBOR-linked financial instruments. Among those harmed were floating rate bondholders, who received artificially low interest payments for the use of their money.

Respondents' conduct gave rise to a variety of suits by parties claiming that they were injured by the suppression of U.S. dollar LIBOR. The Judicial Panel on Multidistrict Litigation (JPML) ordered that LIBOR-related litigation be transferred for pretrial proceedings to the United States District Court for the Southern District of New York. Pet. App. 5a-7a; *see* 28 U.S.C. § 1407(a) ("When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any

district for coordinated or consolidated pretrial proceedings.").

The LIBOR multidistrict litigation (MDL) proceedings include class as well as individual actions. The district court consolidated the then-pending class actions on November 29, 2011. *See* J.A. 289. Individual actions filed by entities related to Charles Schwab & Co. (Schwab) were also before the district court, but were not consolidated. *Id.* 289 n.5.

Several months later, the district court revoked its order consolidating the class cases and replaced it with a more limited one. *See* Pet. App. 10a. The court recognized that under the MDL statute its "authority over actions transferred from districts outside of the Southern District of New York extends only to pretrial matters," whereas Rule 42(a) "effectuates consolidation for all purposes (including trial) . . . ." *Id.* The court therefore ordered that the class actions in the MDL would be consolidated "for pretrial purposes only." Pet. App. 11a. The court did not direct the class action plaintiffs to file a single, integrated complaint. The Schwab actions remained separate from the class actions.

Respondents filed motions to dismiss the Schwab actions and three separate class action complaints:

a. The complaint filed by Ellen Gelboim and Linda Zacher—petitioners in this Court—on behalf of purchasers of bonds with LIBOR-linked interest rates, alleging a single claim that the defendants had violated federal antitrust law;

b. A unified complaint on behalf of "over-the-counter" purchasers from one or more of the respondents, of LIBOR-linked instruments (known as "the OTC plaintiffs"), alleging a federal antitrust claim, as well as a state law claim for unjust enrichment;

c. A unified complaint on behalf of purchasers of LIBOR-linked instruments on exchanges (known as "the exchange plaintiffs"), alleging a federal antitrust claim, Commodity Exchange Act claims based on respondents' conduct regarding certain Eurodollar futures contracts, and a state law claim for unjust enrichment.

Meanwhile, roughly forty more LIBOR-related complaints were filed in or transferred to the Southern District of New York. Those complaints largely raised the same allegations as the previously filed complaints. The court stayed all proceedings on those follow-on complaints while it adjudicated the motions to dismiss the four non-stayed cases.[2] *See* Pet. App. 18a.

3. The district court denied in part respondents' motion to dismiss the exchange plaintiffs' claim under the Commodity Exchange Act. *Id.* 65a, 156a. The court also permitted the OTC plaintiffs to amend their complaint to assert state law claims for unjust

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[2] For the purposes of this point, petitioners treat Schwab's three individual non-stayed actions as a single case.

enrichment and violation of the implied covenant of good faith and fair dealing. *Id.* 161a.[3]

But the district court granted respondents' motion to dismiss all the other claims set forth in all the non-stayed cases. *Id.* 18a-19a, 155a-58a. Particularly relevant here, the court held that no plaintiff could assert an antitrust claim because none could assert a cognizable antitrust injury. *Id.* 59a, 155a-56a. That ruling resolved the only claim for relief asserted in petitioners' complaint.

The court subsequently denied petitioners leave to file a second amended complaint. *Id.* 193a-200a. The court accordingly specified that the action was "dismissed in [its] entirety . . . ." *Id.* 219a. The case's docket provided that it was "terminat[ed] pursuant to instructions from Chambers . . . ." *Id.* 12a.[4]

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[3] Motion practice before the district court has continued on the surviving claims in the non-stayed actions. The district court decided the remaining motions by memorandum and order on June 23, 2014. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11-md-2262(NRB), 2014 WL 2815645 (S.D.N.Y. June 23, 2014). Substantially narrowed claims for commodities manipulation, breach of the implied covenant of good faith and fair dealing, and unjust enrichment remain pending in the non-stayed actions. *See id.* at *28.

[4] Because the court clerk did not enter judgment on a separate document as required by Federal Rule of Civil Procedure 58(b)(1)(C), judgment on its decision denying all relief in petitioners' action was deemed entered after 150 days pursuant to Federal Rule of Civil Procedure 58(c)(2)(B).

The district court applied its decision dismissing the LIBOR plaintiffs' antitrust claims not only to all the non-stayed cases (such as petitioners' complaint), but also to the stayed cases pending at that time.[5] As respondents subsequently represented to the district court, because all the claims "are based on the same core theory . . . none of the federal and state antitrust claims can survive." J.A. 304; *see also* J.A. 323, 338, 345, 358-59 (letters from attorneys in various stayed cases effectively acknowledging that the district court's order will result in dismissal of their antitrust claims); *but see* J.A. 314 (letter from FDIC and Freddie Mac asserting that their antitrust claims can proceed). The substantial majority of civil actions in the LIBOR MDL proceedings assert federal and/or state antitrust claims. *See* J.A. 309-11 (identifying actions raising an antitrust claim).

The district court also dismissed the Schwab plaintiffs' federal racketeering claim. Pet. App. 124a, 157a. Having dismissed all of Schwab's federal claims, the court declined to exercise supplemental jurisdiction over Schwab's remaining state law claims.

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[5] The court entered a docket entry "granting in part and denying in part Motion to Dismiss in" more than fifteen other cases: 1:13-cv-00598-NRB; 1:13-cv-00597-NRB; 1:12-cv-05723-NRB; 1:12-cv-05822-NRB; 1:12-cv-06056-NRB; 1:12-cv-06693-NRB; 1:12-cv-07461-NRB; 1:13-cv-00398-NRB; 1:13-cv-00626-NRB; 1:13-cv-00625-NRB; 1:13-cv-00627-NRB; 1:13-cv-00667-NRB; 1:13-cv-00346-NRB; 1:13-cv-00407-NRB; 1:13-cv-01135-NRB; 1:13-cv-01198-NRB; 1:13-cv-01456-NRB; and 1:13-cv-01016-NRB. *See* J.A. 60-61 (docket entry 286).

Id. 147a, 157a. Thus, like petitioners' antitrust suit, Schwab's civil actions were terminated in their entirety.

4. Federal law gives the courts of appeals "jurisdiction of appeals from all final decisions of the district courts . . . ." 28 U.S.C. § 1291. Petitioners accordingly filed a notice of appeal, as did Schwab. *See* J.A. 1.

The exchange and OTC plaintiffs sought to join the appeal with respect to their dismissed antitrust claims. They requested that the district court enter judgment under Federal Rule of Civil Procedure 54(b), which provides that "[w]hen an action presents more than one claim for relief . . . or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay," and thus facilitate an immediate appeal. The district court granted the request, explaining that petitioners and Schwab were "in a position to appeal as of right because their complaints were dismissed in their entirety." Pet. App. 220a. Further, because petitioners' and Schwab's appeal "rais[e] issues that affect all four categories of plaintiffs equally . . . there [was] no just reason for delay[ing]" the exchange and OTC plaintiffs' appeals. *Id.* 220a-21a.

The court of appeals, however, dismissed petitioners' appeal, stating:

> This Court has determined *sua sponte* that it lacks jurisdiction over these appeals because a final order has not been issued by the district

> court as contemplated by 28 U.S.C. § 1291, and the orders appealed from did not dispose of all claims in the consolidated action. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978); *Houbigant, Inc. v. IMG Fragrance Brands, LLC*, 627 F.3d 497, 498 (2d Cir. 2010) (per curiam). Upon due consideration, it is hereby ORDERED that the appeals are DISMISSED.

Pet. App. 2a. The Second Circuit precedent cited by the court's order, *Houbigant*, 627 F.3d at 498, applied that court's prior ruling that "when there is a judgment in a consolidated case that does not dispose of all the claims which have been consolidated, there is a strong presumption that the judgment is not appealable absent Rule 54(b) certification." *Hageman v. City Investing Co.*, 851 F.2d 69, 71 (2d Cir. 1988). That presumption may be overcome only in "highly unusual circumstances." *Houbigant*, 627 F.3d at 499 (quoting *Hageman*, 851 F.2d at 71).[6]

In response to the court of appeals' order dismissing petitioners' and Schwab's appeals, the district court withdrew its own order permitting the exchange plaintiffs and OTC plaintiffs to appeal under Rule 54(b). Pet. App. 222a. The district court similarly denied petitioners' request that it enter an appealable judgment under Rule 54(b). J.A. 294.

Noting a circuit split over whether and when an order dismissing an action that has been consolidated

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[6] The Second Circuit subsequently denied reconsideration. Pet. App. 4a.

with others is appealable, petitioners sought review in this Court. This Court granted certiorari. *See* 134 S. Ct. 2876 (June 30, 2014) (mem.).

SUMMARY OF ARGUMENT

An order dismissing a civil action in its entirety is a final decision immediately appealable under 28 U.S.C. § 1291, even if the action has been consolidated with others for pretrial purposes.

1. Section 1291 requires the courts of appeals to exercise jurisdiction over "all final decisions" from U.S. district courts unless an appeal may be had directly to the Supreme Court. That mandatory language requires the courts of appeals to exercise jurisdiction, providing losing parties with a right to appeal adverse judgments.

In this case, petitioners' entire complaint was dismissed with prejudice. That dismissal plainly constitutes a "final decision" within the meaning of Section 1291. It ended all litigation on the merits of petitioners' sole claim for relief. The district court thus correctly recognized that because it had dismissed petitioners' complaint "in [its] entirety," they were entitled "to appeal as of right . . . ." Pet. App. 220a.

Unquestionably, had petitioners' action not been consolidated under the MDL statute, 28 U.S.C. § 1407, their right to appeal would be intact. The mere fact of consolidation—which Section 1407 limits to pretrial purposes only—does not change that result. No matter what happens in the remainder of the MDL litigation, petitioners' civil action has been

permanently extinguished. That "decision" is "final." Moreover, Section 1407 does not contemplate that consolidated actions merge. To the contrary, the statute provides that the civil actions are transferred for coordinated or consolidated pretrial proceedings, and that upon the completion of those proceedings, the actions are then remanded back to the transferring jurisdictions. *See* 28 U.S.C. § 1407(a). The temporary coexistence during Section 1407 pretrial proceedings is a far cry from joinder or any other process that would merge petitioners' action with others.

Indeed, this Court has long held that "consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Johnson v. Manhattan Railway*, 289 U.S. 479, 496-97 (1933) (footnote omitted). In subsequently adopting the federal rules of civil procedure, this Court did not depart from the substance of that holding. Moreover, this Court has never stated or even suggested the opposite, *i.e.*, that consolidation merges civil actions so that a judgment disposing entirely of one plaintiff's action would not be appealable because another consolidated action remains pending.

2. The facts of this case illustrate that adhering to the plain meaning of Section 1291 enhances judicial efficiency. The Second Circuit's ruling leaves petitioners in an indefinite stasis. They may neither participate in the ongoing district court proceedings nor appeal. But there is no reason for delay. The

district court's ruling on the remaining claims will not inform the court of appeals' disposition of petitioners' appeal.

There is also a significant prospect that the plaintiffs with claims pending in the district court will proceed to discovery. But petitioners will be excluded from that process, notwithstanding that the facts to be developed include matters—such as the nature of respondents' collusive agreements, transactions, and communications over a period of years—that are important to petitioners' claims. If petitioners later prevail on their delayed appeal, they will have to replicate the massive discovery and trial preparation effort from which they are presently excluded. Not only is it highly likely that petitioners' efforts would be prejudiced by prior discovery rulings over which they have no control, but it is also clear that—no matter the result—the parties will have to expend massive amounts of time and resources to duplicate a process that had already been carried out.

The ruling below also creates the serious prospect that consolidated litigation will give rise to duplicative appeals. When the pretrial MDL proceedings conclude, the underlying complaints that have not been dismissed will return to their originating courts, located in diverse circuits. When those originating courts later finally resolve those civil actions, the subsequent appeals—including appeals from the district court's antitrust ruling—will occur in those circuits. The result is that multiple courts of appeals will be required to decide the identical legal questions, multiplying effort, expense, drain on judicial resources,

and the risk of conflicting rulings—precisely the results the MDL statute was designed to avoid.

The Second Circuit's rule also forces litigants to guess whether an adverse judgment is an immediately appealable final decision. The Second Circuit recognizes a presumption against appeals until all consolidated actions are fully resolved, and states that the presumption may be overcome in unspecified "highly unusual circumstances." Whether a case will qualify as "highly unusual" is so subjective that panels inevitably will disagree about the appealability of factually similar cases. When parties cannot tell whether a judgment against them is appealable, they will inevitably appeal for fear of otherwise losing their opportunity to do so. Appellate courts, in turn, will be compelled to adjudicate the issue of appellate jurisdiction—a process that is wasteful and unproductive.

Recognizing an immediate right of appeal solves all of these problems. It ensures that petitioners' antitrust claims will be resolved promptly, providing them either with finality or with an opportunity to participate in the consolidated discovery process. Furthermore, recognizing the appealability of the district court's judgment will provide a clear date from which a notice of appeal must be filed, and will further facilitate the orderly resolution of appeals raising identical questions of law.

Against those considerations is: nothing. The ordinary purpose of the final judgment rule is to prevent piecemeal appeals. But there is nothing piecemeal about a plaintiff appealing the dismissal of

her entire complaint. To the extent that other plaintiffs with surviving claims have also raised claims that were dismissed (*e.g.*, the antitrust claims in this MDL), they may ask for leave to appeal those decisions under Federal Rule of Civil Procedure 54(b)—relief that the district court has already proven willing to grant. The experience of circuits that permit appeals in these circumstances proves that immediate appeals accelerate the orderly resolution of complex cases without adverse side effects on courts' ability to manage their dockets.

Moreover, a clear rule permitting immediate appeals from every decision dismissing a civil action in its entirety would not impair courts' ability to control their dockets. Courts have a variety of mechanisms including setting briefing schedules, appointing lead counsel, and holding cases in abeyance to decide them together, which permit them to ensure that cases are resolved fairly. None of that would change if petitioners and similarly situated parties were permitted to appeal from decisions dismissing their complaints.

3. In opposing certiorari, respondents argued that petitioners themselves must resort to Rule 54(b) if they wish to bring an immediate appeal. But that rule, by its terms, does not apply to petitioners' claim. Rule 54(b) permits the district court to enter a partial final judgment in a single civil action involving multiple claims or parties, thus facilitating early appeals from partial judgments on the merits. Petitioners, however, brought only a single action

raising a single claim, which was dismissed in its entirety. Rule 54(b) therefore does not apply.

This Court has previously explained that the purpose of Rule 54(b) is to facilitate appeals in an era in which joinder of claims and parties has become substantially easier. But the rule was never intended to alter the processing of multiple civil actions that have been consolidated—as opposed to multiple claims or parties joined. Nor was the rule intended to apply when, as here, the district court dismisses a plaintiff's entire complaint.

Indeed, a broader application of Rule 54(b) would exceed the rulemaking power through which the rule was adopted.[7] Plaintiffs had the statutory right to appeal the dismissal of an entire complaint long before Rule 54(b) was adopted, and the rule never sought to change that. Although Congress subsequently granted this Court the power to adopt additional rules that would alter the definition of finality, Rule 54(b) was not an exercise of that authority. Indeed, the fact that this Court could alter the definition of finality by rule—after having the opportunity to receive comments—counsels against adopting an interpretation of Rule 54(b) that applies beyond the single multi-claim and/or multi-party civil action denoted by the rule's plain language for the purpose of

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[7] As discussed in detail *infra*, the Rules Enabling Act, as it existed when the Rules were adopted and also when Rule 54(b) was amended, did not permit the creation of rules that expand or contract jurisdiction granted by statute.

restricting appellate rights when actions have been consolidated.

ARGUMENT

When a civil action is dismissed in its entirety, the order of dismissal constitutes a final decision immediately appealable under 28 U.S.C. § 1291, even if the civil action has been consolidated with other civil actions for pretrial purposes.

I. The District Court's Decision Dismissing Petitioners' Action In Its Entirety Is A Final Decision Subject To Immediate Appeal.

1. Petitioners filed a complaint alleging that respondents violated the antitrust laws by colluding to manipulate the LIBOR rate. That complaint commenced a civil action, which by statute was consolidated "for pretrial purposes only" with other plaintiffs' civil actions against the same defendants arising from the same core facts. Pet. App. 11a. The district court dismissed petitioners' complaint on the merits pursuant to Federal Rule of Civil Procedure 12(b)(6). *See id.* 156a, 220a. That decision terminated petitioners' civil action. In the words of Rule 58(b)(1)(C), the order "denie[d] all relief," requiring the district court clerk to "promptly prepare, sign, and enter the judgment." Fed. R. Civ. P. 58(b)(1). Petitioners moved for leave to amend their complaint, but, consistent with its intention to dismiss petitioners' antitrust claims "with prejudice," *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11-md-2262(NRB), 2013 WL 1947367, at *1 n.1 (S.D.N.Y. May 3, 2013), the district court denied that

motion. *See In re LIBOR-Based Fin. Instruments Antitrust Litig.*, 962 F. Supp. 2d 606, 624-28 (S.D.N.Y. 2013).

Under 28 U.S.C. § 1291, which provides that "[t]he courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts," the district court's judgment dismissing petitioners' complaint was a "final decision" because it "end[ed] the litigation on the merits and le[ft] nothing for the court to do but execute the judgment." *Ray Haluch Gravel Co. v. Cent. Pension Fund of Int'l Union of Operating Eng'rs*, 134 S. Ct. 773, 779 (2014) (citation omitted); *see also Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978). The phrase "all final decisions" has a settled meaning under this Court's precedents, necessarily including all judgments on the merits that "terminate an action . . . ." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545 (1949); *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009).[8]

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[8] This Court has also recognized a "small class of collateral rulings that, although they do not end the litigation, are appropriately deemed final." *Mohawk*, 558 U.S. at 106 (internal quotation marks omitted). That exception is not relevant here because this case does not involve a collateral order. Moreover, the collateral order doctrine is a one-way ratchet: it expands the concept of finality to facilitate faster appeals. But this Court has never adopted a restrictive notion of finality that stifles appellate review after a trial court disposes of an entire civil action—and it has never taken the position that courts may deem a particular judgment final, or not, as a matter of judicial discretion.

The mandatory and sweeping language of the statute, *i.e.*, that the courts "shall" have jurisdiction over "all" final decisions, does not contemplate judicial discretion to decline jurisdiction over a final decision. *See Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall' . . . normally creates an obligation impervious to judicial discretion.").[9] And this Court has repeatedly emphasized that "federal courts have a strict duty to exercise the jurisdiction that is conferred upon them by Congress." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 716 (1996); *Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 15 (1983) ("[T]he federal courts have a virtually unflagging obligation . . . to exercise the jurisdiction given them.") (internal quotation marks omitted). Petitioners were therefore entitled to appeal from the district court's decision as "a matter of right." *Heckler v. Edwards*, 465 U.S. 870, 876 (1984); *see also Devlin v. Scardelletti*, 536 U.S. 1, 14 (2002) (the "right to appeal from an action that finally disposes of one's rights has a statutory basis" in Section 1291); Fed. R. App. P. 4 (heading refers to "Appeal as of Right").

The district court agreed. In its order dated October 17, 2013, the court explained that "[t]he

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[9] *See also Lopez v. Davis*, 531 U.S. 230, 241, (2001) (noting Congress's "use of a mandatory 'shall' . . . to impose discretionless obligations"); Black's Law Dictionary 1375 (6th ed. 1990) ("As used in statutes . . . this word is generally imperative or mandatory.").

March 29, 2013 decision, *inter alia*, dismissed the Sherman Act, section 1, claims advanced in each complaint . . . ." Pet. App. 219a. In the district court's view, petitioners—who had only brought an antitrust claim—were "in a position to appeal as of right because their complaint[] w[as] dismissed in [its] entirety." *Id.* 220a. The court even went so far as to grant Rule 54(b) judgments to parties that had brought other (non-dismissed) claims alongside their antitrust claims, so that they could join petitioners' appeal on the antitrust issue. *Id.* 221a (concluding that there was "no just reason for delay[ing]" the other parties' appeals in light of petitioners' appeal as of right).

2. If petitioners' lawsuit had never been consolidated with others, it is obvious that the order dismissing their complaint would have constituted a final decision subject to immediate appeal. The question is therefore whether the fact of consolidation dictates a different result. The answer is "no" because consolidation—and especially limited consolidation for pretrial purposes under Section 1407—does not merge multiple civil actions into a single one. Consequently, it does not render a "decision" terminating one of those actions any less complete or any less "final."

Petitioners' action was consolidated with related actions pursuant to the MDL statute. 28 U.S.C. § 1407. The statute provides that "[w]hen civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings." *Id.* § 1407(a). It

further provides that "[e]ach action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated." *Id.*

The language of the statute makes it plain that civil actions retain their separate status in the MDL, though they proceed in parallel through pretrial proceedings and the district court regularly issues rulings that apply to the suits in common. The statute provides that the individual actions are transferred for consolidated "pretrial proceedings" only, never stating or even suggesting that the actions merge into a new, unified action during those proceedings. Once pretrial proceedings conclude, the statute further requires the actions to be individually remanded to their home jurisdictions. Thus, Congress expressly contemplated that although civil actions may be swept into multidistrict pretrial proceedings, the actions maintain their individuality, and will be returned as such to the transferring district court for trial unless terminated beforehand.

In *Lexecon*, this Court held that this remand requirement was mandatory, thus barring the transferee district court from transferring a consolidated action to itself for trial. *See* 523 U.S. at 40-41. The Court explained that:

> Section 1407(a) speaks not in terms of imbuing transferred actions with some new and distinctive venue character, but simply in terms of "civil actions" or "actions." It says that such an action, not

> its acquired personality, must be terminated before the Panel is excused from ordering remand. The language is straightforward, and with a straightforward application ready to hand, statutory interpretation has no business getting metaphysical.

Id. at 37.[10] Congress unequivocally spoke in terms of "civil actions," "actions," and "[e]ach" one of them,

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[10] Several courts of appeals recognize that civil actions subject to MDL proceedings retain their separate and individual character, and recognize jurisdiction over immediate appeals when such individual civil actions are terminated. *See, e.g., Brown v. United States*, 976 F.2d 1104, 1107 (7th Cir. 1992) ("Since the consolidation [under Section 1407] was for pretrial proceedings only, the [plaintiff's] case retains its separate identity."); *United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 216-17 (D.C. Cir. 2003) (appeal permitted where civil action consolidated only to the extent permitted by Section 1407 because it "retained its separate status and the order dismissing it was a final judgment, appealable without the need for a Rule 54(b) certification"). Even the Ninth Circuit, which applies a categorical rule barring immediate appeal in consolidated cases absent a Rule 54(b) judgment, *see Huene v. United States*, 743 F.2d 703 (9th Cir. 1984) (adopting categorical rule barring immediate appeal) *and Lasalle v. Streich Lang PA*, 121 F.3d 716 (Table), 1997 WL 453702, at *1 (9th Cir. June 30, 1997) (applying *Huene* to case consolidated with others in MDL proceedings), recognizes that, "[w]ithin the context of MDL proceedings, individual cases that are consolidated or coordinated for pretrial purposes remain fundamentally separate actions, intended to resume their independent status once the pretrial stage of litigation is over," *In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 700 (9th Cir. 2011), and, moreover, that

viewed as an individual unit. *See id.* Thus, under Section 1407(a), "[e]ach action" must either be terminated prior to the conclusion of pretrial proceedings, thereby obviating remand, or remanded if not terminated. *See id.*

The Second Circuit's rule—which effectively holds that consolidation merges the various civil actions in the MDL so that appeals in one must await the resolution of the others—thus conflicts with the plain statutory language as well as this Court's reasoning in *Lexecon*, and should be reversed.

Finally, the statutory trigger for consolidation is also instructive. Under Section 1407, actions may be consolidated if they "involv[e] one or more common questions of fact . . . ." 28 U.S.C. § 1407(a). The statute tellingly does not permit consolidation when actions involve only common legal questions. Indeed, the legal theories underlying the various consolidated actions may be wide-ranging—as they are in this MDL. And when, as here, a consolidated action is dismissed pretrial on purely legal grounds, there is no reason to believe that the legal issues in that appeal will necessarily overlap with issues in pending consolidated actions, and therefore no reason to

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"considerations that animate the restrictions placed on a transferee court's exercise of jurisdiction over its MDL docket—including the principle that individual cases remain separate actions despite being coordinated or consolidated for pretrial purposes—do not dissipate because a particular case was filed in the MDL's home district." *Id.* at 700 n.13.

question the finality, or appealability, of that legal judgment.

3. Although this case was not consolidated pursuant to Federal Rule of Civil Procedure 42(a), the precedents interpreting that rule and its statutory predecessors likewise support the conclusion that consolidated actions retain their separate identities. Prior to the adoption of the Federal Rules of Civil Procedure, this Court construed the then-existing consolidation statute, 28 U.S.C. § 734, in *Johnson v. Manhattan Railway*, 289 U.S. 479 (1933). The Court there recognized that "consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties, or make those who are parties in one suit parties in another." *Id.* at 496-97.[11]

That holding is consistent with the Court's earlier decision in *Mutual Life Insurance Co. of New York v. Hillmon*, 145 U.S. 285 (1892), in which the Court construed Section 921 of the Revised Statutes, the predecessor to the statute construed in *Johnson*:

> [A]lthough the defendants might lawfully be compelled, at the discretion of the court, to try the cases together, the causes

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[11] For this reason, the Court held that a challenge to the appointment of a receiver in one case by a party in a separate case consolidated with the first was a collateral rather than direct attack, and thus could prevail only if the appointing judicial officer lacked the power to make the appointment. *Johnson*, 289 U.S. at 495-96.

> of action remained distinct, and required separate verdicts and judgments; and no defendant could be deprived, without its consent, of any right material to its defense, whether by way of challenge of jurors or of objection to evidence, to which it would have been entitled if the cases had been tried separately.

Hillmon, 145 U.S. at 293.[12]

Following adoption of the Rules of Civil Procedure in 1938, intra-district consolidation has been governed by Rule 42(a), which originally provided that courts had the power to order the consolidation of "actions of a like nature or involving a common question of law or fact." The term "consolidation" was not further defined, and thus neither the text nor the history of Rule 42 suggests any desire to depart from *Johnson* and *Hillmon*. Indeed, the original advisory committee note to Rule 42 clarified that the rule "continues the substance of U.S.C., Title 28, § 734," the statute construed in *Johnson*, except to the degree that the two differed expressly. Report of the Advisory Comm. on Rules for Civil Procedure 104 (1937), *available at* http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CV04-1937.pdf.

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[12] The Court therefore held that three defendants sued in three consolidated cases each were still entitled to three peremptory challenges, and that the trial court's allowance of only three peremptory challenges to defendants as a group was reversible error. *Hillmon*, 145 U.S. at 293-94.

The drafting history of Rule 42 supports the conclusion that it maintained the settled rule that consolidation does not mean merger. The Advisory Committee's preliminary draft of the rule would have empowered a court to "order all such actions consolidated in a single action, if they might originally have been joined in a single action under these rules." Gaylord A. Virden, *Consolidation Under Rule 42 of the Federal Rules of Civil Procedure*, 141 F.R.D. 169, 175 (1992) (italics omitted). This language, which would have abrogated *Johnson*, was deliberately omitted from the final version of the rule, in favor of language that never suggested merger into a "single action." This drafting history is compelling evidence that Rule 42(a) consolidation was not intended to merge separate civil actions into one. *Cf. I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.").[13]

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[13] In addition to striking proposed language that would have effected a merger of civil actions through consolidation, the final version of Rule 42 removed earlier proposed language that would have provided for splitting a civil action into two or more civil actions. In the final version of the Rules, the action-splitting function instead was addressed in Rule 21. *See* Virden, *supra*, at 179-81. This provides further evidence that consolidation was always intended to be a separate mechanism, with different purposes, than both merger and separation.

The structure of the Federal Rules likewise indicates that Rule 42(a) consolidation does not merge civil actions. In particular, Rule 20 provides for the permissive joinder of parties if two conditions are met. First, the claims must arise "out of the same transaction, occurrence, or series of transactions or occurrences." Fed. R. Civ. P. 20(a)(1)(A). Second, a "question of law or fact common to all" of them will arise in the action. *Id.* 20(a)(1)(B). If these conditions are met, then the plaintiffs may join "in one action." *Id.* 20(a)(1). The "same transaction" requirement differs from the requirements of Rule 42, which permits consolidation if "actions before the court involve a common question of law or fact." Fed. R. Civ. P. 42(a). Permitting parties to merge multiple cases into a single action via consolidation would therefore permit them to circumvent the "same transaction" requirement of Rule 20.

In other circumstances, the Federal Rules of Civil Procedure refer to an "action" in ways that only make sense if consolidated actions retain their separate character. For example, Rule 4(m) permits a defendant to secure dismissal of an action if service of process was not timely made. In consolidated litigation involving multiple complaints against the same defendant, the defendant can pursue the defense against those complaints that were not properly served, without also having to show that there was no service of the other consolidated complaints. Another example: plaintiffs may dismiss "an action" without a court order by securing "a stipulation of dismissal signed by all parties who have appeared." Fed. R. Civ. P. 41(a)(1)(A)(ii). The plaintiff can obtain such a

dismissal with signatures from all parties appearing in the plaintiff's own action; she need not additionally secure the signatures of parties in all other actions subject to a consolidation order. A final example: a federal court must dismiss "the action" if it finds that it lacks subject-matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3). But when civil actions are consolidated, that determination must be made for each separate civil action, and not for the litigation as a whole.

This Court has seldom opined on the nature and effect of consolidation under Rule 42(a)—but its few opinions in this area have been consistent with *Johnson* and *Hillmon*. In *Butler v. Dexter*, 425 U.S. 262 (1976) (per curiam), the Court held that it lacked appellate jurisdiction to review the ruling of a three-judge district court because the plaintiff's case did not raise the unconstitutionality of a state statute. In so holding, the Court considered the fact that the case had been "consolidated in the District Court with several other cases, at least some of which did bring into question the constitutionality of a state statute." *Id.* at 267 n.12. That did not alter the outcome, however, because "[e]ach case before this Court . . . must be considered separately to determine whether or not this Court has jurisdiction to consider its merits." *Id.* This conclusion is consistent with *Johnson*'s holding that consolidation does not merge individual cases into one case, and *Hillmon*'s holding that consolidated actions remain distinct.

More recently, in *Shady Grove Orthopedic Associates, P.A. v. Allstate Insurance Co.*, 559 U.S. 393, 408 (2010) (plurality opinion), the Court explained

that Rule 42(a) consolidation "neither change[s] plaintiffs' separate entitlements to relief nor abridge[s] defendants' rights; [it] alter[s] only how the claims are processed." The plurality further explained that class actions under Rule 23 are a "species" of joinder under Rule 18—but did not group Rule 42 with those rules, again reaffirming that consolidation does not merge actions into a single case. *See id.*; *see also Sprint Commc'ns Co., L.P. v. APCC Servs., Inc.*, 554 U.S. 269, 291 (2008) (listing Rule 42(a) consolidation as one method "by which multiple similarly situated parties get similar claims resolved at one time and in one federal forum," but not stating or suggesting that Rule 42(a) consolidation merges separate civil actions into one).

Some circuit courts have questioned whether *Johnson* requires the conclusion that consolidated actions retain their separate identities in all cases. *See, e.g.*, *Schnabel v. Lui*, 302 F.3d 1023, 1035-36 (9th Cir. 2002); *Sandwiches, Inc. v. Wendy's Int'l, Inc.*, 822 F.2d 707, 710 (7th Cir. 1987); *Ringwald v. Harris*, 675 F.2d 768, 770 (5th Cir. 1982). For the reasons explained above, these courts are incorrect; indeed, the Seventh Circuit acknowledged that its conclusion was "not ideal," and "appears to make jurisdiction turn on an irrelevancy"—in that case, whether the plaintiff chose to consolidate two related cases or not. *See Sandwiches*, 822 F.2d at 710. Moreover, consistent with the plain statutory language as interpreted in *Lexecon*, actions consolidated for pretrial purposes under Section 1407(a) clearly do retain their separate identity, such that a decision dismissing one of the consolidated actions is properly regarded as a final

judgment falling within the traditional core of "final decisions" appealable under Section 1291. *See Brown v. United States*, 976 F.2d 1104, 1107 (7th Cir. 1992).

II. This Case Illustrates Why Immediate Appeal Is Desirable.

This case demonstrates why an immediate appeal is not only required by the applicable statute and rules, but desirable as well. Allowing petitioners to appeal now will promote judicial economy by preventing both a significant potential duplication of efforts by the parties and the judiciary, and a delay in the overall resolution of the LIBOR litigation.

1. Congress enacted Section 1407 in order to promote "coordinated or consolidated pretrial proceedings" in cases that share "common questions of fact." 28 U.S.C. § 1407(a).[14] The statute yields some of its greatest benefits during discovery, which often is expensive and time-consuming.

In this case, the Judicial Panel on Multidistrict Litigation correctly concluded that a significant common core of factual information underlies all of the LIBOR cases. *See In re Libor-Based Fin. Instruments Antitrust Litig.*, 802 F. Supp. 2d 1380 (J.P.M.L. 2011). Petitioners' antitrust claim arises from respondents' alleged contract, combination, or conspiracy in

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[14] In contrast with Section 1407(a), subsection (h), which applies only to antitrust litigation commenced by state attorneys general *parens patriae*, provides for consolidation "for both pretrial purposes and for trial."

unreasonable restraint of trade, in violation of 15 U.S.C. § 1. Other plaintiffs have brought additional claims, including for violations of the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.*, for aiding and abetting such violations, and for various state law violations.

The factual information germane to all of these claims encompasses the actions of sixteen banks over a period of years, at least from 2007 until 2010. Discovery will include the various transactions and communications of each of those institutions internally, between and among themselves, and with third parties, such as the BBA, regulators, transactional intermediaries, and market reporting entities. Economic data, such as prevailing interest rates and facts peculiar to each bank's financial condition during the relevant period,[15] will also need to be developed by many plaintiffs, since such data may bear directly upon the artificiality of the LIBOR rates submitted by each bank each day and the measure of damages for various claims. These matters are extensive and highly complex. Discovery and factual development will undoubtedly be expensive and challenging.

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[15] Since each bank's daily LIBOR submission is supposed to reflect the rate at which that bank could borrow unsecured funds overnight, the quoted rate would be expected to reflect, among other factors, the relative risk of lending money to the quoting bank as opposed to another bank in a different financial condition.

But while other parties, with other claims, proceed to discovery, petitioners and their antitrust claim remain on the sidelines. Indeed, it appears that none of the antitrust claims in the LIBOR MDL can survive the district court's antitrust dismissal rationale, as defendants explained in their letter to the district court. *See supra* at 7; J.A. 304. If petitioners' appeal is delayed, but ultimately successful, then the entire discovery and trial preparation effort will need to be repeated for petitioners' antitrust claim. This duplication would conflict with the interests of the litigants and the public in "the just, speedy, and inexpensive determination of every action and proceeding," Fed. R. Civ. P. 1, with discovery principles reflected in Federal Rule of Civil Procedure 26(b)(2)(C), which directs courts to prevent unreasonably duplicative, burdensome, or expensive discovery,[16] and with the purpose of coordination under Section 1407, which is to eliminate "multiplied

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[16] *See, e.g.*, *Tank Connection, LLC v. Haight*, No. 13-cv-1392-JTM-TJJ, 2014 WL 3361760, at*3 (D. Kan. July 9, 2014) ("Plaintiff should not be compelled at this time to produce information . . . that may be duplicative of information Defendant Haight has already turned over to the Receiver."); *In Re: C. R. Bard, Inc., Pelvic Repair Sys. Prod. Liability Litig.*, MDL No. 2187, 2014 U.S. Dist. LEXIS 89147, at *466 (S.D.W.Va. June 30, 2014) (in part limiting "the scope of the deposition to matters that are not cumulative, duplicative, [or] available through other sources . . ."); *Helget v. City of Hays*, No. 13-2228-KHV/KGG, 2014 U.S. Dist. LEXIS 86095, at *25 (D. Kan. June 25, 2014) ("[T]he Court does not want to impose unnecessarily costly or unreasonably duplicative discovery on Defendant City.").

delay, confusion, conflict, inordinate expense and inefficiency." *In re Plumbing Fixtures Cases*, 298 F. Supp. 484, 495 (J.P.M.L. 1968). An immediate appeal, by contrast, preserves the potential that any antitrust discovery can be coordinated with discovery on other claims, thereby saving costs and effort for all parties.

In addition to injecting uncertainty and expense into the discovery process, delaying petitioners' appeal will disrupt the orderly resolution of the LIBOR litigation. The LIBOR MDL encompasses not only actions filed in the Southern District of New York, but also actions transferred there from district courts in California, Illinois, Iowa, Kansas, Massachusetts, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Texas, Virginia, and Wisconsin. *See* J.A. 29, 56-58, 66, 68, 84, 88, 92, 109, 123, 139, 154-55 (transfer orders at MDL docket entries 1, 248, 253, 261, 263, 291, 308, 368, 378, 380, 390, 437, 475, 512, 561, 566). Any complaints that avoid dismissal will be remanded to their home districts after pretrial procedures. When that happens, the inevitable post-trial appeals will be heard by as many as ten different circuits.[17] That will undermine "one of the objectives of the final judgment rule," which is to "ensure only a single appeal" relating to each issue. *U.S. ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 217 (D.C. Cir. 2003); *see also Utah v. Am. Pipe & Constr. Co.*, 316 F. Supp. 837, 839 (C.D. Cal.

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[17] The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth Circuits.

1970) (explaining that denying immediate appeals in this case would undermine "[o]ne of the purposes of § 1407," which is "to eliminate the potential for conflicting contemporaneous pretrial rulings by coordinate district and appellate courts in multidistrict related civil actions") (internal quotation marks and footnote omitted). Indeed, it is possible that all ten circuits will be considering the appeals at the same time, without the benefit of rulings from each other, since the rationale of the Second Circuit is that no dismissal is appealable until a final judgment is entered disposing of all claims and all parties in *all* of the cases in the MDL proceeding. Even if the appeals are staggered, there will likely be overlap between them, as well as the potential for conflicting adjudications.

Disallowing an immediate appeal in an MDL also creates the potential for confusion and the undue loss of appellate rights. The timely filing of a notice of appeal is "mandatory and jurisdictional." *Browder v. Director, Dep't. of Corr.*, 434 U.S. 257, 264 (1978) (quotation marks and citation omitted). Under the Second Circuit's rule, it is unclear whether petitioners are permitted to appeal once the pretrial proceedings in all of the consolidated actions conclude, or whether they must wait until all of the actions are litigated to final judgment in their home jurisdictions. The latter possibility is daunting indeed, as petitioners would have to monitor all of the dockets after the consolidated actions are remanded to ensure that they file their notice of appeal in a timely manner—after the last consolidated action concludes. And the choice

between the two possibilities is not dictated by any statute, rule, or precedent.

2. The fact that these practical concerns exist at all discredits the Second Circuit's rule, and counsels in favor of a clear rule permitting immediate appeals. This Court's precedents recognize that when the potential loss of appellate rights is at stake, "litigants ought to be able to apply a clear test" to determine the manner in which their appeal must be perfected. *Heckler*, 465 U.S. at 876. The Second Circuit's case-by-case approach is anything but clear. That court holds that there is a "strong presumption" that adverse decisions in consolidated cases are not final, which can be overcome only in "highly unusual circumstances." But the court of appeals has never explained what those circumstances are. Consequently, whether a decision is appealable or not is subject to the whims of a particular panel—and different panels facing comparable facts have reached opposing conclusions. *Compare Kamerman v. Steinberg*, 891 F.2d 424, 429-30 (2d Cir. 1989) (finding "highly unusual circumstances" when the action at issue was the only one presenting derivative (shareholder) claims, when the district court had decided all such claims in the defendant's favor, and when the district court had intended its judgment to be final) *with* Pet. App. 2a (finding no jurisdiction because the district court's order "did not dispose of all claims in the consolidated action," even though petitioners' complaints were "dismissed in their entirety," Pet. App. 219a, and the district court thus believed that petitioners were "in a position to appeal

as of right" *id.* 220a). The ambiguity inherent in this standard thus threatens appellate rights and ensures wasteful litigation in a way that a categorical rule would not.

The Second Circuit's rule thus guarantees confusion and waste because in order to ensure that the right to appeal is not inadvertently waived by delay, every rational losing party will immediately file a protective notice of appeal. This, in turn, will force the courts of appeals to adjudicate the issue of appellate jurisdiction, needlessly consuming party and judicial resources. Describing the practical problems that arose from a prior version of Rule 54(b), this Court explained that it was "inherently difficult to determine" when particular claims were appealable. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 434 (1956). "The result was that the jurisdictional time for taking an appeal from a final decision . . . in some instances expired earlier than was foreseen by the losing party. It thus became prudent to take immediate appeals in all cases of doubtful appealability and the volume of appellate proceedings was undesirably increased." *Id.*[18] A clear, categorical

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[18] *See Hageman*, 851 F.2d at 71 ("[W]e recognize that it is desirable to provide litigants with the clearest possible guidance concerning when a judgment is final so that premature appeals are avoided and opportunities to file timely notices of appeal are preserved."); *Huene v. United States*, 743 F.2d 703, 704 (9th Cir. 1984) ("[I]t is essential that the point at which a judgment is final be crystal clear because appellate rights depend upon it. The opportunity to appeal could be lost by a mistaken belief that the

rule permitting appeals from all decisions dismissing a complaint on the merits addresses this problem.

Against these considerations, there is no sound argument for not recognizing petitioners' right to an immediate appeal. The general policy underlying the final judgment rule—a preference against allowing piecemeal appeals in a single action—does not apply here because petitioners' entire action has been dismissed. The district court decided that petitioners had failed to state an antitrust injury as a matter of law. That decision effectively ended all of the antitrust litigation in the MDL, and there has never been any suggestion that further pretrial developments relating to the non-antitrust claims that remain in some of the cases will be germane to the resolution of the purely legal issues presented by petitioners' appeal. Thus, it makes no sense to hold up petitioners' appeal while the remaining actions in the MDL proceed.

2. Experience bears out the contention that permitting immediate appeals accelerates the progress of litigation and settlement. As explained in the Petition for a Writ of Certiorari, the majority of circuits would have permitted petitioners' appeal. The

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judgment is not final and a consequent failure to file timely a notice of appeal. On the other hand, uncertainty as to the finality of the judgment could lead to the premature filing of a notice of appeal with the consequent waste of time and resources."); *Spraytex, Inc. v. DJS&T*, 96 F.3d 1377, 1382 (Fed. Cir. 1996) (criticizing case-by-case approach because it may cause the premature filing of appeals).

First and Sixth Circuits employ categorical rules that the dismissal of a consolidated action is always appealable. Six additional circuits hold that when cases are consolidated only for pretrial purposes, they retain their separate identity such that a judgment of dismissal is appealable. In some instances, these approaches have been employed for decades with no apparent ill effects.

One instructive example is *In re: Katrina Canal Breaches Litigation*, 345 F. App'x. 1 (5th Cir. 2009). In that case, a class action lawsuit by Louisiana residents against the U.S. Army Corps of Engineers was consolidated with dozens of lawsuits against a host of defendants. The actions were not consolidated for all purposes, but rather solely for purposes of convenience and judicial economy. *See id.* at 4. In 2008, the district court dismissed the case against the Corps for failure to exhaust administrative remedies, and the plaintiffs appealed. *Id.* at 3-4. On June 30, 2009, the Fifth Circuit determined that it had jurisdiction because the cases were not consolidated for all purposes, and it affirmed. *See id.* at 4. The remaining consolidated cases were not finally resolved in the district court until June 24, 2014. Had the Fifth Circuit reversed, the plaintiffs and the Corps could have participated in the ensuing five years of district court proceedings. If the Second Circuit's rule had applied, however, the plaintiffs would have had to wait six years for their right to appeal, and the United States would have had to wait that long for its appellate victory.

Similarly, in *Evans v. Akers*, 534 F.3d 65, 69 (1st Cir. 2008), two ERISA class action lawsuits pursuing conflicting theories of liability were consolidated in Massachusetts. In the first action, *Evans*, the district court denied the motion for class certification and dismissed the action on December 6, 2006, *see Evans v. Akers*, 466 F. Supp. 2d 371, 378 (D. Mass. 2006); the plaintiffs appealed on January 3, 2007, obtaining a reversal on July 18, 2008, *see Evans*, 534 F.3d at 65. The second action, *Bunch v. W.R. Grace & Co.*, was certified as a class action on March 1, 2007. *See* 534 F.3d at 69 n.3. On cross motions for summary judgment, the *Bunch* plaintiffs' claim was terminated on January 30, 2008. *Id.* An appeal in *Bunch* was docketed on April 2, 2008, and the district court's judgment was affirmed on January 29, 2009. *See* 555 F.3d 1 (1st Cir. 2009). By that time, *Evans* had already been remanded, and had reached a settlement. Had the *Evans* plaintiffs been required to wait until the district court resolved *Bunch* before appealing, the case would have been delayed by at least a year.

And in *DaSilva v. Esmor Correctional Services, Inc.*, 167 F. App'x 303, 305 (3d Cir. 2006), detainees in a New Jersey prison brought three separate actions—*Brown* (a class action), *DaSilva* (a multi-party action), and *Jama* (another multi-party action)—alleging abusive and inhumane conditions at the facility. The cases were consolidated for discovery purposes. *Brown* settled, and the court ordered that notice should be mailed to class members on May 1, 1999, with an opt-out deadline of June 1, 1999. *See id.* at 306. The class included plaintiffs in the *DaSilva* and *Jama* actions. After notices proved difficult to deliver, the opt-out

deadline was extended several times, ultimately to July 23, 2003. *See id.* While some of the *Jama* plaintiffs opted out of the *Brown* settlement, none of the *DaSilva* plaintiffs did—their action was therefore dismissed. *Id.* The district court subsequently approved the *Brown* settlement in 2005. *See id.* at 307 n.3. While the *Jama* action was pending in the district court, the defendant appealed the extension of the opt-out deadline, and the *DaSilva* plaintiffs appealed the dismissal of their class claim. The Third Circuit held that it had jurisdiction, and that the consolidation of the actions did not render the judgment non-final. *See id.* A contrary rule would have put the *Jama* plaintiffs through the expense of a trial without knowing whether their opt-outs were valid, and it would have put the *Brown* settlement into a state of limbo pending the outcome of that trial, denying relief to the parties in the interim, thus directly contradicting the judicial policy favoring settlement, which seeks to resolve without delay the conflicting claims of the parties.

As these examples illustrate, the wisdom of the majority of circuits should govern here. A clear rule permitting appeals from consolidated actions that are dismissed facilitates finality and the orderly administration of justice.

III. Rule 54(b) Does Not Diminish Petitioners' Appeal Rights.

Respondents argue to the contrary that petitioners should not pursue an appeal as of right, but should instead request that the district court enter a partial final judgment under Federal Rule of Civil Procedure 54(b). *See* BIO 10. But Rule 54(b), by its terms, does

not apply to petitioners' action. Moreover, subjecting petitioners' appeal to Rule 54(b) would not serve the purpose of the rule, which is to speed—not delay—appeals.

1. The text of Rule 54(b) resolves this argument. It provides:

> Judgment on Multiple Claims or Involving Multiple Parties. When *an action* presents more than one claim for relief . . . or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end *the action* as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

Fed. R. Civ. P. 54(b) (emphasis added). Thus, by its terms, Rule 54(b) applies only to a single action—not to multiple separate actions consolidated only for pretrial purposes. Had petitioners' complaint alleged multiple grounds for relief, some of which had not been dismissed, then petitioners agree that they would have to pursue a Rule 54(b) judgment in order to appeal. But petitioners' complaint raised only a single claim for relief, and was dismissed "in [its] entirety." Pet. App. 220a. Consequently, Rule 54(b) is inapplicable.

Context confirms that the rule drafters meant what they said when they used the singular "action." This Court reviewed the history of Rule 54(b)'s adoption in *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427 (1956), observing that the motivation for its adoption came from the simultaneous adoption of a liberal rule of permissive joinder, permitting multiple claims in a single civil action:

> With the Federal Rules of Civil Procedure, there came an increased opportunity for the liberal joinder of claims in multiple claims actions. This, in turn, demonstrated a need for relaxing the restrictions upon what should be treated as a judicial unit for purposes of appellate jurisdiction. Sound judicial administration did not require relaxation of the standard of finality in the disposition of the individual adjudicated claims for the purpose of their appealability. It did, however, demonstrate that, at least in multiple claims actions, some final decisions, on less than all of the claims, should be appealable without waiting for a final decision on *all* of the claims. Largely to meet this need, in 1939, Rule 54(b) was promulgated in its original form through joint action of Congress and this Court.

Id. at 432-33 (footnote omitted). *See also Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511-12 (1950) (explaining that Rule 54(b) was intended to deal

with difficulties arising from the joinder of disparate claims).[19]

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[19] The conclusion that Rule 54(b) applies to singular civil actions does not appear to be the subject of much dispute in the courts of appeals. *See, e.g., Robert Bosch, LLC v. Pylon Mfg. Corp.*, 719 F.3d 1305, 1331 n.1 (Fed. Cir. 2013) (Rule 54(b) "applies to multiple claims in a single action"); *U.S. Citizens Ass'n v. Sebelius*, 705 F.3d 588, 596 (6th Cir. 2013) (noting district court's recognition "'that Rule 54(b) is intended to strike a balance between the undesireability [sic] of more than one appeal in a single action and the need for making review available in multiple-party or multiple-claim situations at a time that best serves the needs of the litigants.'") (internal quotation marks omitted); *Brooks v. Dist. Hosp. Partners, L.P.*, 606 F.3d 800, 806 (D.C. Cir. 2010) ("If appellants' claims were actually severed under Rule 21 and then dismissed, that would have meant *all* the claims in a *single civil action* were dismissed. A Rule 54(b) certification therefore would have been both inapplicable and unnecessary since the dismissal, standing alone, would have constituted an appealable final judgment."); *Vander Zee v. Reno*, 73 F.3d 1365, 1368 n.5 (5th Cir. 1996) ("The government suggests in its brief that this Court lacks jurisdiction to hear this appeal because the district court failed to certify a final judgment pursuant to Fed. R. Civ. P. 54(b). However, Rule 54(b) certification is required only when the district court directs the entry of a final judgment with respect to less than all of the parties or claims presented in a single action. When the district court severed the claims against the individual defendants and the United States from the original action, it created two separate actions. The district court then entered a judgment dismissing all of the claims before us today. Therefore, no Rule 54(b) certification was required to render the judgment final and appealable.") (citation omitted).

Rule 54(b) has also never been understood to apply when a district court's decision dismisses a complaint in its entirety. This Court said as much:

> The amended rule does not apply to a single claim action nor to a multiple claims action in which all of the claims have been finally decided. It is limited expressly to multiple claims actions in which 'one or more but less than all' of the multiple claims have been finally decided and are found otherwise to be ready for appeal.

351 U.S. at 435.[20] *See also Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 742-43 (1976) (holding that Rule 54(b) does not apply where the "complaint advanced a single legal theory which was applied to only one set of facts"). Indeed, "'final judgments' are at the core of matters appealable under § 1291," *Sullivan v. Finkelstein*, 496 U.S. 617, 628 (1990), and Rule 54(b) did not purport to change that.

All of this makes sense, because the purpose of Rule 54(b) was to accelerate appeals in actions involving multiple claims—not to delay them in

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[20] *Sears* was decided before the 1961 amendment to Rule 54(b), which added language to clarify that the Rule applies not only to multiple claim cases, but also to multiple party cases. *See Liberty Mut.*, 424 U.S. at 744 n.3 ("Rule [54(b)] was amended to insure that orders finally disposing of some but not all of the parties could be appealed pursuant to its provisions."); *see also* Fed. R. Civ. P. 54(b), advisory committee note (1961). The amendment did not make Rule 54(b) applicable to the complete termination of a civil action.

actions involving a single claim. Respondents' proposed rule would turn the purpose of Rule 54(b) on its head.

2. Indeed, Rule 54(b) cannot be read so broadly. In *Sibbach v. Wilson*, 312 U.S. 1, 10 (1941), this Court established that the delegation of rulemaking power under the Rules Enabling Act, now codified at 28 U.S.C. § 2072, does not authorize the expansion or contraction of jurisdiction conferred by statute. *See also Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992); *Snyder v. Harris*, 394 U.S. 332, 337-38 (1969). The Rules of Civil Procedure must be construed consistently with the limitations of the rulemaking power conferred by the Rules Enabling Act, or, if such a construction is not available, not applied at all. *See Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 423 (2010) (Stevens, J., concurring in part and concurring in the judgment) ("[W]hen such a 'saving' construction is not possible and the rule would violate the Enabling Act, federal courts cannot apply the rule."). Accordingly, any construction and application of the Rules that has the effect of directly limiting the appellate jurisdiction conferred by Section 1291 is by definition legal error.

Prior to the adoption of the Second Circuit's rule in *Hageman*, and similar rules in other circuits, it was always clear that a plaintiff had the right under Section 1291 (or its predecessor) to appeal a district court decision that terminated his or her action by dismissing all of the plaintiff's claims against all defendants, leaving nothing more for the district court to do. *See Catlin v. United States*, 324 U.S. 229, 236

(1945) (had motion to dismiss entire action been granted, "clearly there would have been an end of the litigation and appeal would lie within Section 128 [Section 1291's predecessor]."). Plaintiffs' right to appeal such a final judgment long predated adoption of the Rules. *See Sears*, 351 U.S. at 432 n.3 ("In cases involving multiple parties where the alleged liability was joint, a judgment was . . . appealable [if] it terminated the action as to all the defendants.") (citing *Hohorst v. Hamburg-American Packet Co.*, 148 U.S. 262 (1893)). Further, as noted above, prior to the adoption of the Rules, this Court had held in *Johnson*, 289 U.S. at 496-97, that consolidation does not merge separate cases into one; and this Court thus permitted appeals from judgments that disposed of one or more but not all cases subject to a consolidation order. *See, e.g., United States v. River Rouge Improvement Co.*, 269 U.S. 411, 413-14 (1926); *Withenbury v. United States*, 72 U.S. 819, 821-22 (1866).

Thus, when the Rules were adopted, it was well established that the predecessor to Section 1291 granted appellate jurisdiction over district court orders terminating a plaintiff's entire civil action. No construction of the Federal Rules that would justify abridging petitioners' appeal rights is therefore consistent with the Rules Enabling Act, and therefore no such construction is permissible.

Nothing in the language or history of Rules 42(a) and 54(b) purported to contract Section 1291 appellate jurisdiction over the complete termination of a civil action by requiring a Rule 54(b) judgment when the terminated action has been consolidated with other

civil actions still pending, nor can they, under *Sibbach*, be interpreted to have that effect. *Cf. Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("[O]f overriding importance, courts must be mindful that [Rule 23] as now composed sets the requirements they are bound to enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers . . . . The text of a rule thus proposed and reviewed limits judicial inventiveness.").[21]

Finally, the application of Rule 54 is unnecessary to achieve what respondents describe as its principal virtue: flexibility. This is because even a categorical rule regarding finality will not undermine courts' ability to control their dockets. Courts have a variety of mechanisms to ensure orderly adjudication. Indeed,

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[21] In 1990, Congress added a new subsection to Section 2072, authorizing the Court, through the rulemaking procedure, to "define when a ruling of a district court is final for the purposes of appeal under section 1291 . . . ." 28 U.S.C. § 2072(c). This new provision may provide the Court with the authority to expand or contract Section 1291 jurisdiction of the courts of appeals by adopting rules that define finality. Assuming Section 2072 creates that power, it did not exist when Rules 42 and 54 were adopted and when Rule 54(b) was amended; nor has rulemaking authority conveyed in the new subsection been invoked by the Court since its enactment in 1990. Accordingly, Rules 42(a) and 54(b) must, like all Rules adopted prior to the 1990 enactment of Section 2072(c), be interpreted consistently with this Court's holding in *Sibbach*, 312 U.S. at 10, that the delegation of rulemaking power under the Rules Enabling Act did not authorize the expansion or contraction of jurisdiction conferred by statute.

"[i]n discretionary matters going to the phasing, timing, and coordination of the cases, the power of the MDL court is at its peak." *In re Korean Air Lines Co., Ltd.*, 642 F.3d 685, 700 (9th Cir. 2011). District courts may set briefing and discovery schedules; they may designate lead counsel to ensure an orderly presentation of claims, or they may hold some cases in abeyance while proceeding with others. *See id.* And if a court concludes that separate civil actions raise closely related issues, it will often (for that very reason) decide all the motions to dismiss them together, thus facilitating a simultaneous appeal. Like the district courts, courts of appeals also have mechanisms to control their dockets. If unusual circumstances warrant, they can stay an appeal until parallel litigation concludes in the district court. *See, e.g., In re Food Lion, Inc., Fair Labor Standards Act Effective Scheduling Litig.*, 73 F.3d 528, 533 (4th Cir. 1996).

CONCLUSION

The judgment of the Second Circuit should be reversed.

Respectfully submitted,

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RESPONDENT'S BRIEF

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ELLEN GELBOIM, *et al.*,

Petitioners,

v.

BANK OF AMERICA CORPORATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether, when cases are consolidated for pretrial purposes, an order that dismisses the claims in one of the consolidated cases but does not terminate the pretrial proceedings is immediately appealable as of right under 28 U.S.C. § 1291, rather than at the sound discretion of the district court under Federal Rule of Civil Procedure 54(b) or 28 U.S.C. § 1292(b).

CORPORATE DISCLOSURE STATEMENT

Respondent Bank of America, N.A. is wholly owned by BANA Holding Corporation, which in turn is wholly owned by BAC North America Holding Company, which in turn is wholly owned by NB Holdings Corporation, which in turn is wholly owned by respondent Bank of America Corporation. Respondent Bank of America Corporation has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent The Bank of Tokyo-Mitsubishi UFJ, Ltd. is wholly owned by Mitsubishi UFJ Financial Group, Inc.

Respondent Barclays Bank PLC is wholly owned by Barclays PLC.

Respondent Citibank, N.A. is wholly owned by Citicorp, which in turn is wholly owned by respondent Citigroup Inc. Respondent Citigroup Inc. has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent Coöperatieve Centrale Raiffeisen-Boerenleenbank B.A. (Rabobank) has no parent corporation and no publicly held company owns 10% or more of Rabobank.

Respondent Credit Suisse Group AG has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent Deutsche Bank AG has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent HBOS plc is wholly owned by respondent Lloyds Banking Group plc, which has no par-

ent corporation and no publicly held company owns 10% or more of its stock.

Respondent HSBC Bank plc is wholly owned by respondent HSBC Holdings plc, which has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent JPMorgan Chase Bank, N.A. is wholly owned by respondent JPMorgan Chase & Co., which has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent The Norinchukin Bank has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent Portigon AG (f/k/a WestLB AG) has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent Royal Bank of Canada has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent The Royal Bank of Scotland Group plc has no parent corporation and no publicly held company owns 10% or more of its stock.

Respondent UBS AG has no parent corporation and no publicly held company owns 10% or more of its stock.

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IN THE

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS

INTRODUCTION

Section 1291 of Title 28 confers appellate jurisdiction over "final decisions of the district courts of the United States." That provision reflects the long-settled rule in the federal courts "forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy." *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940). The purpose of that rule, this Court has recognized, is to ensure "a healthy legal system." *Id.* at 326. The question presented here is whether the rule bars an immediate appeal as of right when one constituent in a consolidated district-court action is dismissed from ongoing pretrial proceedings. It does.

Petitioners brought suit in the Southern District of New York alleging manipulation of the U.S. Dollar London Interbank Offered Rate (LIBOR). Their lawsuit was consolidated for pretrial purposes with numerous other cases making similar allegations, so that a single district court could manage them "for practical purposes [as] a single controversy." *Cobbledick*, 309 U.S. at 325. When the district court dismissed some claims (including petitioners') but not others, petitioners filed an immediate appeal.

Petitioners maintain that, from their vantage point, the litigation was at an end because their complaint had been dismissed in its entirety. That is not the right perspective from which to answer the question. Consolidation serves the interests of the judicial system as a whole, as does the federal policy against piecemeal appeals. Here, the district court proceedings are ongoing, and petitioners' federal antitrust claim is virtually identical to one raised in approximately 26 of the other pending cases, many of which encompass additional claims not yet addressed or resolved in the consolidated pretrial proceedings.

Petitioners contend that the final judgment rule and the Federal Rules of Civil Procedure not only permit, but require (on pain of forfeiture), an immediate appeal whenever one constituent in a consolidated action is dismissed, notwithstanding the pendency and progress of the consolidated action. That position would run counter to a policy Congress has long deemed fundamental to a well-functioning legal system: discouraging piecemeal appeals. Petitioners' rule would lead to delay, confusion, the proliferation of appeals, and incentives to engage in claim-splitting. The effects would be particularly acute in multidistrict litigation, where Congress has recognized that the need

for careful planning, coordination, and management by the district court is at its zenith. The district judge in such cases is uniquely well positioned to assess when issues common to the consolidated litigation have been sufficiently developed to make appellate review efficient and to avoid premature, piecemeal appeals. Moreover, petitioners' rule would have minimal countervailing benefit to the parties or judicial economy more broadly, as the availability of certification under Rule 54(b) or 28 U.S.C. § 1292(b) mitigates the ills petitioners hypothesize without opening the spigot of interim appeals as of right.

An order disposing of only some of the claims in a consolidated action is not immediately appealable, even if it disposes of all of one party's claims, for as long as the action remains consolidated. That rule is faithful to the final judgment rule and the policy against piecemeal appeals, is consistent with 28 U.S.C. § 1291 and the Federal Rules of Civil Procedure, and is clear and easily administrable—"a major virtue in a jurisdictional statute," *Hertz Corp.* v. *Friend*, 559 U.S. 77, 94 (2010). Under that rule, the court of appeals lacked jurisdiction over petitioners' appeal.

STATEMENT

A. The MDL Process

This case arises from multidistrict litigation (MDL) composed of over 60 lawsuits. Congress enacted the MDL statute, 28 U.S.C. § 1407, to "promote the just and efficient conduct" of "civil actions involving one or more common questions of fact" pending in different federal district courts, *id.* § 1407(a). The statute was a response to "the federal courts' experience with a massive prosecution of electrical equipment manufacturers

for antitrust violations, which had been rendered manageable only by conducting joint pretrial proceedings" on an ad hoc basis. *In re PPA Prods. Liab. Litig.*, 460 F.3d 1217, 1229-1230 (9th Cir. 2006). "Congress saw a need to create a mandatory version of that procedure to govern cases such as 'civil antitrust actions ..., common disaster (air crash) actions, patent and trademark suits, products liability actions and securities law violation actions, among others.'" *Id.* (quoting H.R. Rep. No. 90-1130, at 3 (1968)).

Congress intended the system to "'assure uniform and expeditious treatment in the pretrial procedures in multidistrict litigation.'" *PPA Litig.*, 460 F.3d at 1230; *see also In re Library Editions of Children's Books*, 297 F. Supp. 385, 386 (J.P.M.L. 1968) (Wisdom, J.) ("'The basic purpose of assigning [multiple litigation] to a single judge is to provide for uninterrupted judicial supervision and careful, consistent planning and conduct of pretrial and trial proceedings' that will eliminate or reduce conflict and duplication of effort." (alteration in original)).

The Judicial Panel on Multidistrict Litigation (JPML) has authority to administer the MDL statute and to transfer cases to a single district court where coordination or consolidation will serve "the convenience of parties and witnesses" and "promote the just and efficient conduct" of the litigation. 28 U.S.C. § 1407(a). An MDL thus "bring[s] before a single judge all of the federal cases, parties, and counsel comprising the litigation." *Manual for Complex Litigation (Fourth)* § 20.132 (2004) (*MCL*).

The establishment of MDL proceedings and the transfer of related cases to the MDL court are left to the sound discretion of the JPML. Once the JPML becomes aware of a constellation of cases arguably pre-

senting common issues, it "analyzes each group of cases in light of the statutory criteria and the primary purposes of the MDL process to determine whether transfer is appropriate." *PPA Litig.*, 460 F.3d at 1230. Those criteria include "the progress of discovery, docket conditions, familiarity of the transferee judge with the relevant issues, and the size of the litigation." *Id.*

The JPML's judgment to transfer cases to an MDL court is intended to ensure efficient resolution of all the lawsuits taken as a whole, not the expedited disposition of any particular case. *See, e.g., In re Stirling Homex Sec. Litig.*, 442 F. Supp. 547, 550 (J.P.M.L. 1977) (per curiam) ("The Panel's statutory mandate is to weigh the interests of all parties and to consider multidistrict litigation as a whole in light of the purposes of Section 1407."); *Children's Books*, 297 F. Supp. at 386 (rejecting "a worm's eye view of Section 1407" that would favor "the interest of each plaintiff" over the interests of "multiple litigation as a whole"); *see also* Transfer Order 2, Dkt. 355 (S.D.N.Y. June 6, 2013) ("In deciding issues of transfer under Section 1407, we look to the overall convenience of the parties and witnesses, not just those of a single plaintiff or defendant in isolation.").[1]

Upon transfer of an action to the transferee court, "the jurisdiction of the transferor court ceases and the transferee court has exclusive jurisdiction." *MCL* § 20.131. "A transferee judge exercises all the powers of a district judge in the transferee district under the

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[1] Indeed, consistent with its focus on the interests of all parties and the court system as a whole, the JPML may transfer actions to an MDL even when the MDL court has already dismissed identical claims in previously transferred actions in the consolidated proceedings. *See, e.g., In re Merscorp Inc. RESPA Litig.*, 560 F. Supp. 2d 1371, 1372 (J.P.M.L. 2008).

Federal Rules of Civil Procedure[.]" *PPA Litig.*, 460 F.3d at 1230-1231. "This includes authority to decide all pretrial motions, including dispositive motions such as motions to dismiss, motions for summary judgment, motions for involuntary dismissal under Rule 41(b), motions to strike an affirmative defense, and motions for judgment pursuant to a settlement." *Id.* at 1231.[2] Likewise, "during the period of the 1407(a) transfer, any appeals—interlocutory or after summary judgment—go to the court of appeals for the transferee court, not the courts of appeals for the transferor circuits." *In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1178-1179 (D.C. Cir. 1987) (D.H. Ginsburg, J., concurring).

As long as cases remain consolidated before the MDL court, the transferee judge is accorded substantial discretion to manage an often sprawling docket and to guide the matter to a just and efficient resolution:

> For it all to work, multidistrict litigation assumes cooperation by counsel and macro-, rather than micro-, judicial management because otherwise, it would be an impossible task for a single district judge to accomplish. Coordination of so many parties and claims requires that a district court be given broad discretion to structure a procedural framework for moving the cases as a whole as well as individually, more so than in an action involving only a few parties and a handful of claims.

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[2] MDL proceedings with overlapping putative class actions require particularly acute oversight from the transferee judge. *See In re Plumbing Fixture Cases*, 298 F. Supp. 484, 493 (J.P.M.L. 1968) ("It is in the field of class action determinations in related multidistrict civil actions that the potential for conflicting, disorderly, chaotic judicial action is the greatest.").

PPA Litig., 460 F.3d at 1231-1232; *see also In re San Juan Dupont Plaza Hotel Fire Litig.*, 111 F.3d 220, 229 (1st Cir. 1997) (transferee judge must be accorded sufficient discretion to be able to "'uncomplicate matters'" in an MDL).

"In practice, ... the vast majority of transferred cases are disposed of completely in the transferee court[.]" *In re Food Lion FLSA Litig.*, 73 F.3d 528, 532 (4th Cir. 1996). In instances where the pretrial proceedings do not dispose entirely of the case, the JPML must remand individual cases to the transferor courts for trial. 28 U.S.C. § 1407(a). "When remand occurs depends upon the circumstances of the litigation and the recommendation of the transferee court." *PPA Litig.*, 460 F.3d at 1231 (citing *MCL* § 20.133).[3]

B. LIBOR MDL

The JPML established MDL No. 2262—*In re LIBOR-Based Financial Instruments Antitrust Litigation*—in August 2011 (JA29), for cases involving "common questions of fact ... arising from allegations concerning defendants' participation" in the U.S. Dollar LIBOR panel (Pet. App. 6a). Transfer, the JPML explained, would "eliminate duplicative discovery, prevent inconsistent pretrial rulings on class certification, discovery, and other pretrial issues, and conserve the resources of the parties, their counsel and the judici-

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[3] *See, e.g.*, Order 16, Dkt. 117, *In re Fenofibrate Patent Litig.*, No. 11-md-2241 (S.D.N.Y. Dec. 28, 2012) ("The Clerk of the Court is directed to enter judgment in favor of defendants, close this case, and notify the [JPML] that this litigation is now completed."); Order 7, Dkt. 17082, *In re Agent Orange Prod. Liab. Litig.*, No. 79-md-381 (E.D.N.Y. Mar. 11, 2005) ("All the above-listed cases in the MDL 381 litigation have been dismissed. The Clerk of this court is respectfully requested to notify the Clerk of the MDL Panel.").

ary." *Id.* 7a. Since the establishment of the MDL, more than 60 lawsuits—including those filed by petitioners and their amici—have proceeded together before the Honorable Naomi Reice Buchwald in the Southern District of New York. Judge Buchwald's management of the cases, the JPML has repeatedly remarked, has been "careful and efficient." Transfer Order 2, Dkt. 355; Transfer Order 1, Dkt. 378 (S.D.N.Y. Aug. 7, 2013).

1. Following transfer, the plaintiffs then before the MDL court moved "to consolidate the class action complaints" for all purposes "pursuant to Federal Rule of Civil Procedure 42(a)." Pet. App. 10a-11a; *see* JA273-276. Plaintiffs explained that the cases "all arise from common facts" (concerning respondents' participation in setting LIBOR) and "share substantially overlapping legal claims." JA273, JA274. Any differences between the cases "do not outweigh the interests of judicial economy served by consolidation" (JA276) of all the LIBOR cases "into a single action" (JA273), such as "eliminat[ing] duplicative discovery, prevent[ing] inconsistent pretrial rulings, and conserv[ing] the resources of the parties, their counsel and the judiciary" (JA274). "Accordingly," the plaintiffs concluded, "all of the [LIBOR suits], and any similar actions that are subsequently filed in or transferred to this District should be consolidated." JA276. The district court granted the plaintiffs' request for consolidation "for all purposes." JA286. The court also took other steps to manage the sprawling litigation, including appointing interim class counsel for several putative classes of plaintiffs. JA281.

Petitioners filed their complaint in the Southern District of New York almost six months after the JPML transferred the LIBOR cases there and two months after the district court consolidated the LIBOR

cases for all purposes. JA5, JA30. Seeking to represent a putative class of bondholders, petitioners told the court that their complaint was "related" to the preexisting litigation and requested, in the court's words, "to have [it] consolidated with the consolidated case" already pending. Tr. 5:18, 8:10, Dkt. 117 (S.D.N.Y. Mar. 12, 2012). The district court agreed. *Id.* 9:16. At petitioners' request—so that "the coordinated pursuit of this litigation on the plaintiffs' side of the case [could] continue" (Pls.' Mot. 2, Dkt. 201 (S.D.N.Y. Aug. 13, 2012))—the court also entered a pretrial order appointing petitioners' attorneys as interim class counsel to represent a putative bondholder class. JA288-293.

The district court subsequently concluded that its authority to consolidate cases for all purposes under Rule 42(a) extended only to cases filed in the Southern District of New York (like petitioners' case), and not to cases filed in other federal districts (like many other cases transferred to the MDL). The court accordingly withdrew its prior order of consolidation, which extended to both types of cases. Pet. App. 10a-11a. It then issued a blanket order, "consolidat[ing] the class action complaints pending in the MDL for pretrial purposes only." *Id.* 11a.

2. The district court grouped the then-pending consolidated putative class actions into three categories, each with a single lead case:

- an action brought by purchasers of over-the-counter LIBOR-based instruments, alleging a federal antitrust claim and a state unjust-enrichment claim ("OTC plaintiffs");
- an action brought by purchasers of LIBOR-based products on a domestic exchange, alleging a federal antitrust claim, a state unjust-

enrichment claim, and claims under the Commodity Exchange Act (CEA), 7 U.S.C. §§ 1-26 ("Exchange plaintiffs"); and

- the present case, brought by petitioners on behalf of purchasers of LIBOR-based debt securities, alleging a federal antitrust claim ("Bondholder plaintiffs").

See Pet. App. 17a, 37a, 59a-60a, 148a, 153a. In addition to the three categories of putative class actions, three individual actions brought by the Charles Schwab Corporation and related entities ("Schwab plaintiffs") were also pending before the court. *Id.* 17a. The Schwab plaintiffs asserted a federal antitrust claim, as well as RICO and various state-law claims. *Id.* 37a, 124a, 150a.

The consolidated complaints were, as amended, "essentially identical in their allegations regarding the [case] background ... and the misconduct that defendants allegedly committed." Pet. App. 20a n.2. All plaintiffs advanced the same primary motives for respondents' purported misbehavior and "devote[d] the bulk of their complaints to amassing evidence that LIBOR was fixed at artificially low levels." *Id.* 24a; *see also id.* 38a.

Respondents moved to dismiss the claims in these lead cases. Many new LIBOR-related complaints were filed while motion practice was underway. "It quickly became apparent" to the district court that "new complaints would continue to be filed" and "waiting for the 'dust to settle' would require an unacceptable delay in the proceedings." Pet. App. 17a, 18a. Accordingly, the court stayed all such newly filed LIBOR-related actions pending its decision on motions to dismiss the claims of the Bondholder, OTC, Exchange, and Schwab plaintiffs. *Id.* 18a. The court intended to use its rulings on those

motions to "clarif[y] the legal landscape" and guide the organization and disposition of the later-filed suits. *Id.*

3. In March 2013, the district court granted in part and denied in part respondents' motions to dismiss. Pet. App. 16a-158a. The court dismissed the federal antitrust claims in all of the actions, as well as the federal RICO and state antitrust claims of the Schwab plaintiffs and the unjust-enrichment claims of the Exchange plaintiffs. *Id.* 155a-157a. Having dismissed all of the federal claims raised by the OTC and Schwab plaintiffs, the court declined to exercise supplemental jurisdiction over their remaining state-law claims. *Id.* 147a-148a, 157a. But the court determined that the Exchange plaintiffs had possibly stated a viable CEA claim, subject to timeliness questions the court was not yet "in a position to address." *Id.* 97a.

Motion practice continued, including motions to amend and for reconsideration. In August 2013, the district court denied all of the putative class action plaintiffs leave to amend their antitrust claims. Pet. App. 192a-200a. The court also denied reconsideration of its ruling on the CEA claims, but without prejudice to respondents' later filing of a similar motion. *Id.* 170a-180a. Finally, the court permitted the OTC plaintiffs to reassert their claim for unjust enrichment and to add a claim for breach of the implied covenant of good faith and fair dealing. *Id.* 200a-215a.[4]

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[4] The district court also denied a request by the Exchange plaintiffs to certify for interlocutory appeal a question related to their CEA claims. Pet. App. 162a-170a. The court acknowledged that it had the power to do so under 28 U.S.C. § 1292(b), but found that the Exchange plaintiffs had "not even approached satisfying the requirements" of that statute. *Id.* 170a; *see id.* 163a ("It is a

The net effect of those rulings was that all claims asserted by petitioners and the Schwab plaintiffs were dismissed, but further proceedings were required on remaining claims by the Exchange and OTC plaintiffs. The district court also left in place its stay on other actions to avoid "addressing the individual cases piecemeal rather than comprehensively." Pet. App. 216a.

C. Petitioners' Appeal

1. Petitioners and the Schwab plaintiffs filed notices of appeal in September 2013. JA1, JA175-177. The Exchange and OTC plaintiffs then sought, under Rule 54(b), entry of partial final judgment on their own federal antitrust claims, which the district court had also dismissed for failure to plead antitrust injury. The latter plaintiffs argued that allowing an appeal only by petitioners would be inequitable because the other plaintiffs "should be permitted to brief and argue the appeal that will determine the major issue on their Sherman Act claims—whether antitrust injury is sufficiently pled—at the same time" as petitioners. *See* OTC Pls.' Ltr. 2, Dkt. 414 (S.D.N.Y. Sept. 18, 2013).

The district court agreed, on the (mistaken) premise than an "appeal as of right" by petitioners would already be pending and, in that "atypical context," "there is no just reason" to permit petitioners but not the other plaintiffs to present "the issues of antitrust standing and antitrust injury" to the court of appeals. Pet. App. 220a, 221a. The court therefore entered a partial final judgment on the Exchange and OTC plaintiffs' federal antitrust claims under Rule 54(b). *Id.* 221a.

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basic tenet of federal law to delay appellate review until a final judgment has been entered.'").

2. The court of appeals dismissed petitioners' and the Schwab plaintiffs' appeals for lack of an appealable final judgment: "[A] final order has not been issued by the district court as contemplated by 28 U.S.C. § 1291, and the orders appealed from did not dispose of all claims in the consolidated action." Pet. App. 2a. Under circuit precedent, "'when there is a judgment in a consolidated case that does not dispose of all claims which have been consolidated, there is a strong presumption that the judgment is not appealable absent Rule 54(b) certification.'" *Houbigant, Inc.* v. *IMG Fragrance Brands*, 627 F.3d 497, 498 (2d Cir. 2010) (per curiam).

Petitioners and the Schwab plaintiffs moved for reconsideration. JA2. Petitioners argued for "[e]arly appellate determination of the antitrust issue," which they described as common to "[n]umerous cases" still pending in the district court. Recons. Mem. 8 & n.8, Dkt. 134 (2d Cir. Nov. 15, 2013). The court of appeals denied reconsideration. Pet. App. 3a-4a.

3. In light of the court of appeals' dismissal of petitioners' appeal, the district court withdrew the Rule 54(b) certification for the Exchange and OTC plaintiffs' federal antitrust claims, as that order was "premised on the pendency of appeals on the same claim by [petitioners] and [the] Schwab plaintiffs." Pet. App. 222a.

The court denied requests from petitioners and the Exchange and OTC plaintiffs to reconsider: "[T]his case has a wonderful host of interesting issues. We could send six issues up to the circuit. We're not doing that. We're not doing it seriatim. We're going to clean up this complaint.... [W]e're not picking and choosing particular questions and sending them up." JA294. Petitioners' counsel persisted, asking whether the court might "entertain the 54(b) [request] several months" in

the future, after deciding "the various motions to dismiss" still pending or contemplated in the MDL. JA296. The court stated that it was "not prepared to give ... an answer on that now," but did not rule out future certification. *Id.*

D. Ongoing Proceedings In The MDL

In keeping with its "careful and efficient" case management (Transfer Order 2, Dkt. 355), the district court has continued to keep the MDL proceedings moving apace. Motion practice in the lead cases continued during late 2013, and the court resolved those motions in June 2014, further narrowing the scope of the MDL. The court observed that "three major opinions" and "hundreds, if not thousands, of pages of briefing materials" had been necessary merely to "resolve the threshold question" of "what claims, if any," plaintiffs had adequately pled. Order 79, Dkt. 568 (S.D.N.Y. June 23, 2014).

The district court and the parties then undertook to apply the court's three major opinions in "a case-by-case determination of which claims remain in all the pending cases," including those that had been stayed. JA298. That process remains largely incomplete. Among other things, there are bondholder plaintiffs other than petitioners who raise federal antitrust claims identical to petitioners' and who seek to represent a potentially overlapping putative class, but who also raise additional, distinct, and still-pending claims.[5]

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[5] Compl. ¶¶ 1, 29, 153-162, Dkt. 1, *Guaranty Bank & Trust* v. *Credit Suisse Group*, No. 13-cv-346 (S.D.N.Y. Jan. 15, 2013) (raising, federal antitrust, state antitrust, unfair competition, and consumer protection claims); Compl. ¶¶ 11, 174-184, Dkt. 1, *SEIU Pension Plans Master Trust* v. *Bank of Am.*, No. 13-cv-1456

In addition, the plaintiffs disagree on whether dismissal of the antitrust claims in the lead cases disposed of all the antitrust claims in the MDL proceeding. For instance, the Federal Deposit Insurance Corporation and the Federal Home Loan Mortgage Corporation ("Freddie Mac")—plaintiffs in a previously stayed case—argue that their federal antitrust claims "materially differ" from petitioners' claims. JA314; *see id.* (claiming to allege different "agreements, relevant markets, and harms to competition"). Numerous other plaintiffs take a similar view of their own antitrust claims, likewise arguing that their claims remain viable notwithstanding the court's prior orders. *See* NCUA Ltr. 2, Dkt. 612 (S.D.N.Y. Aug. 20, 2014); Principal Fin. Ltr. 2-3, Dkt. 613 (S.D.N.Y. Aug. 20, 2014). The district court has not yet ruled on the matter. Other plaintiffs do not dispute that their pending antitrust claims are governed by the court's prior orders, but have sought to "preserve [their] appellate rights" on those claims while their other federal and state claims are resolved. JA323; *see* JA338, JA345, JA355 n.5.

SUMMARY OF ARGUMENT

I. An order disposing of some of the claims in consolidated actions is not a final decision, appealable as of right, while the actions remain consolidated—even when it disposes of all of one party's claims. That clear, rigorous, and easily administrable rule accords with Section 1291 and the longstanding federal policy against piecemeal appeals. Under that rule, the judgment of the court of appeals should be affirmed.

(S.D.N.Y. Mar. 5, 2013) (raising federal antitrust, unjust enrichment, and restitution claims).

The courts of appeals have uniformly held (with one possible exception) that, when a district court consolidates actions for all purposes, an order dismissing fewer than all the claims in the consolidated proceedings is not a final decision. The same rule should obtain when the district court consolidates actions only for more limited purposes, such as for pretrial proceedings. When the district court has determined that consolidation is appropriate, it has decided that the cases ought to proceed as one unit of litigation while consolidated. The court's decision to consolidate actions for a period of the proceedings should not be undone by automatic piecemeal appeals during that period. Such a clear rule is especially important for consolidated pretrial proceedings in multidistrict litigation, where Congress has recognized that centralized management before a single decisionmaker is indispensable to the "just and efficient conduct" of the litigation. 28 U.S.C. § 1407(a).

II. Rather than an automatic appeal under Section 1291, Rule 54(b) and Section 1292(b) are the appropriate mechanisms for early appellate review while consolidated proceedings are ongoing. Those procedures rely on the sound discretion of the district court to identify, in the first instance, when an early appeal is appropriate—a task uniquely suited to the district court given its familiarity with the litigation and with the reasons for consolidation. District courts have been using these mechanisms effectively for years in consolidated litigation, particularly including MDLs, to mitigate the hardships that petitioners contend would result if litigants had to wait before taking an appeal.

III. Petitioners' contrary rule—that consolidation has no effect on finality—will create a number of real-world harms with minimal corresponding benefits. Most notably, it will result in seriatim appeals, leading

to piecemeal appellate consideration of the same controversy and to substantial inefficiencies and delays. Moreover, the rule will undercut the district courts' ability to manage complex, consolidated proceedings by eliminating their role as the "dispatchers" of appeals—a result particularly harmful in the MDL context, where the need for effective management is paramount. The rule will also prejudice other litigants who will not have an appeal as of right under petitioners' rule by making it more likely that the party with the weakest case will be the first to present the contested issue on appeal. Finally, the rule will encourage strategic "argument splitting" by plaintiffs' counsel to maximize the chances of early appellate review.

Against this welter of likely deleterious results, petitioners identify little concrete benefit to their rule, which controls only when, not whether, parties in consolidated litigation will have an appeal as of right. Indeed, petitioners are unable to identify *any* case where a rule barring automatic appeal would have resulted in incremental or prejudicial delay.

ARGUMENT

I. DISMISSAL OF PETITIONERS' CLAIM IS NOT AN APPEALABLE FINAL JUDGMENT

A. The Final Judgment Rule Is Essential To A Well-Functioning Judicial System

As early as the Judiciary Act of 1789, Congress provided for appeals in civil cases only from "final decrees and judgments." Ch. 20, § 22, 1 Stat. 73, 84. The final judgment rule, now codified in Section 1291, "has changed little since then." *Midland Asphalt* v. *United States*, 489 U.S. 794, 798 (1989). Then, as now, the rule is understood to reflect a congressional imperative

"forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy." *Cobbledick*, 309 U.S. at 325. "From the very foundation of our judicial system," Congress has sought "to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal." *McLish* v. *Roff*, 141 U.S. 661, 665-666 (1891); *see Luxton* v. *North River Bridge Co.*, 147 U.S. 337, 341 (1893) ("The case is not to be sent up in fragments by successive writs of error.").

The requirement that proceedings in the district court be final before an appeal may be taken "is not a technical concept" but rather a practical means "for achieving a healthy legal system." *Cobbledick*, 309 U.S. at 326. It prevents "the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise." *Id.* at 325. It also "conserv[es] ... judicial energy" and "eliminat[es] ... delays caused by interlocutory appeals." *Catlin* v. *United States*, 324 U.S. 229, 234 (1945). The finality requirement reflects "the deference that appellate courts owe to the trial judge as the individual initially called upon to decide the many questions of law and fact that occur in the course of a trial." *Firestone Tire & Rubber* v. *Risjord*, 449 U.S. 368, 374 (1981). Repeated appellate intervention would threaten "the prerogatives of district court judges, who play a 'special role' in managing ongoing litigation." *Mohawk Indus.* v. *Carpenter*, 558 U.S. 100, 106 (2009); *see Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949) ("Appeal gives the upper court a power of review, not one of intervention.").

To be sure, "[i]mmediate review of every trial court ruling" might result in "more prompt correction of erroneous decisions." *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 430 (1985). By deferring appellate review

until district court proceedings are complete, the final judgment rule may occasionally result in duplicative proceedings on remand. "But that inconvenience is one which ... Congress contemplated in providing that only final judgments should be reviewable." *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 30 (1943). The risk of such possible hardship to individual litigants must be measured against the "debilitating effect on judicial administration caused by piecemeal appellate disposition of what is, in practical consequence, but a single controversy." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 170 (1974). And that risk is considerably lessened by the established discretionary mechanisms for appellate review notwithstanding ongoing district court proceedings, such as Rule 54(b). *See infra* Part II.

This Court has consistently taken a rigorous approach to the final judgment rule. For a decision to be final, it must "end[] the litigation on the merits" and "dispos[e] of the whole case," *Catlin*, 324 U.S. at 233, so that nothing in "the matter remains open, unfinished or inconclusive," *Cohen*, 337 U.S. at 546. Entry of a final, appealable judgment is the act "'by which a district court disassociates itself from'" the proceedings, ending its "'special role' in managing ongoing litigation," and sending the entire controversy up to the court of appeals. *Mohawk*, 558 U.S. at 106.

B. An Order Dismissing Some But Not All Consolidated Claims Is Not A Final Judgment

An order disposing of fewer than all of the pending claims in consolidated cases is not final in the sense required by Section 1291. It does not end the district court's role in supervising the ongoing consolidated litigation; moreover, an immediate appeal from such an order virtually ensures that the court of appeals will be

required to consider the controversy in pieces. That is especially true in MDLs, where the winnowing of claims is but one step in the extensive and complex pretrial management required of the district court.

1. Consolidation for all purposes

Rule 42(a) permits a district court to consolidate together "actions before the court [that] involve a common question of law or fact." Consolidation may entail "join[ing] for ... trial any or all matters at issue." Fed. R. Civ. P. 42(a)(1). But the court may also, in its discretion, determine that "the length of time required to conclude multiple suits as against a single one" and the "relative expense ... of the single-trial, multiple-trial alternatives" instead weigh in favor of consolidation for a more limited duration, such as for pretrial proceedings or discovery. *Arnold* v. *Eastern Air Lines*, 681 F.2d 186, 193 (4th Cir. 1982).

When cases are consolidated for all purposes under Rule 42(a), the courts of appeals (with the possible exception of the Sixth Circuit) have uniformly recognized that an order disposing of only some of the consolidated claims or cases is not a final judgment appealable under Section 1291. *See, e.g.*, *United States ex rel. Hampton* v. *Columbia/HCA Healthcare*, 318 F.3d 214, 216 (D.C. Cir. 2003).[6] That consensus sensibly applies the final judgment rule.

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[6] *See also Global NAPs* v. *Verizon New Eng.*, 396 F.3d 16, 22 (1st Cir. 2005); *Hall* v. *Wilkerson*, 926 F.2d 311, 314 (3d Cir. 1991); *Ringwald* v. *Harris*, 675 F.2d 768, 771 & n.7 (5th Cir. 1982); *Alinsky* v. *United States*, 415 F.3d 639, 642 (7th Cir. 2005); *Mendel* v. *Production Credit Ass'n of Midlands*, 862 F.2d 180, 182 (8th Cir. 1988); *Huene* v. *United States*, 743 F.2d 703, 705 (9th Cir. 1984); *Trinity Broad.* v. *Eller*, 827 F.2d 673, 675 (10th Cir. 1987) (per curiam); *Schippers* v. *United States*, 715 F.3d 879, 884 (11th Cir.

The final judgment is the action "'by which a district court disassociates itself from'" the proceedings. *Mohawk*, 558 U.S. at 106. When the district court disposes of only some of the claims or cases that it has determined should be consolidated for adjudication together, it has done precisely the opposite—determining, in effect, that further proceedings are necessary at least as to some claims. Moreover, appellate review of the disposition of only some of the consolidated claims or cases would result in "piecemeal disposition on appeal" of claims the district court has decided should be treated "for practical purposes [as] a single controversy." *Cobbledick*, 309 U.S. at 325; *see, e.g.*, *Spraytex, Inc.* v. *DJS&T*, 96 F.3d 1377, 1382 (Fed. Cir. 1996) ("[S]ince consolidated cases tend to be based on the same factual circumstances, appellate review of the total consolidated case serves the purposes of appellate efficiency.").

2. Consolidation for pretrial purposes

The question that has divided the courts of appeals is whether a different rule should apply when cases are consolidated only for more limited purposes, such as for pretrial purposes only. *See, e.g.*, *Global NAPs* v. *Verizon New Eng.*, 396 F.3d 16, 22-23 (1st Cir. 2005) (noting split). There is no reason for a different rule in those contexts.

2013); *Spraytex, Inc.* v. *DJS&T*, 96 F.3d 1377, 1382 (Fed. Cir. 1996); *cf. Houbigant*, 627 F.3d at 498 (applying circuit's presumption of non-finality to dismiss appeal); *Eggers* v. *Clinchfield Coal*, 11 F.3d 35, 39 (4th Cir. 1993) (multifactor test including "whether a case has been consolidated for all purposes"). The Sixth Circuit has not been consistent in its approach. *Compare Advey* v. *Celotex Corp.*, 962 F.2d 1177, 1181 (6th Cir. 1992), *with Beil* v. *Lakewood Eng'g & Mfg.*, 15 F.3d 546, 551 (6th Cir. 1994).

When the district court has determined that consolidation is appropriate for any purpose, it has decided that the cases ought to proceed as one litigation unit as long as those purposes are being pursued or satisfied. During whatever period of consolidation, an order disposing of only some of the claims or cases should not be appealable as a final decision under Section 1291, although it may be appealable under other mechanisms, such as Rule 54(b). *See infra* Part II. The type of consolidation (pretrial or for all purposes) affects not *how deeply* the cases are bound together but rather *how long*. While consolidated, cases should travel together, whether in the district court or in the courts of appeals. *See, e.g., Korean Air Lines*, 829 F.2d at 1178-1179 (D.H. Ginsburg, J., concurring) ("[D]uring the period of the 1407(a) transfer, any appeals—interlocutory or after summary judgment—go to the court of appeals for the transferee court, not the courts of appeals for the transferor circuits."); *Spraytex*, 96 F.3d at 1380 (consolidated cases should be treated "similar[ly] to a case with several claims or counterclaims"); *Trinity Broad.* v. *Eller*, 827 F.2d 673, 675 (10th Cir. 1987) (per curiam) (contrary rule "would lead to ... piecemeal review" on appeal).[7]

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[7] The rule advocated here is pellucid—"a major virtue in a jurisdictional statute," *Hertz Corp.*, 559 U.S. at 94—and provides the requisite certainty to litigants. *See, e.g., Huene*, 743 F.2d at 704. The case-by-case approach adopted by some courts of appeals—including, in a modified form, by the Second Circuit, *see supra* p. 13 (discussing court's "strong presumption" rule)—is inconsistent with the purpose of the final judgment rule, to prevent "the mischief of economic waste and of delayed justice" that piecemeal appellate review would cause. *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 124 (1945). By leaving the time for taking an appeal uncertain whenever cases are consolidated for less than all purposes, the case-by-case approach invites needless litigation over the threshold question of finality. *See, e.g., Eggers*, 11 F.3d at 39

Petitioners resist by contending (Br. 19) that consolidation of any kind and any duration "does not merge multiple civil actions into a single one." Thus, petitioners say, a party to consolidated litigation may—indeed, must—appeal as soon as her claims are concluded, as if her case were standing alone. Were they correct, petitioners' rule would apply equally whether cases were consolidated for all purposes or only some. This would gut the policy against piecemeal appeals across all forms of consolidated litigation and would overturn the law of virtually every federal circuit. *See supra* p. 20 & n.6.

Petitioners also contend that dismissal of their claims is a final judgment because it "ended all litigation on the merits of *petitioners'* sole claim for relief," notwithstanding other proceedings on other plaintiffs' claims—including overlapping putative class claims. Pet. Br. 10 (emphasis added). But the same could be said in any multiparty, multiclaim suit, and a district court's final resolution of only some parties' claims in such a suit is not "immediately appealable, even if [the claims] are in some sense separable from the remaining unresolved claims." *Curtiss-Wright Corp.* v. *General Elec.*, 446 U.S. 1, 8 (1980). That the district court has finished with petitioners' individual claims is immaterial; what matters is the system of appellate review as a whole. The relevant question from that vantage point is not whether individual litigants or claims are ready

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(applying circuit's multi-factor test). A case-by-case approach also requires the court of appeals, rather than the district court, to evaluate the nature and extent of the consolidation of the proceedings and thus "take[s] from the district court that made the original decision to consolidate" the subsequent decision whether an appeal, despite ongoing proceedings, is appropriate. *Huene*, 743 F.2d at 705; *see also infra* p. 35 (explaining district court's central role in dispatching appeals under Rule 54(b)).

for an appeal, but rather whether the district court's supervision of the litigation is complete. *See Cobbledick*, 309 U.S. at 326.

3. Multidistrict litigation

a. A clear rule requiring a final resolution of all consolidated proceedings before an appeal under Section 1291 is especially important for consolidated pretrial proceedings in MDLs.

The MDL statute does not prescribe how the transferee court is to manage the proceedings. Instead, "[t]he question of how the cases are to be coordinated or consolidated in the transferee court is for the transferee court to determine." 15 Wright et al., *Federal Practice and Procedure* § 3865 (4th ed. 2013). In some cases, including the present one, the transferee court may determine that some or all of the pending actions should be consolidated for pretrial purposes; in others, the transferee court may determine that only limited coordination is appropriate—as, for example, when related proceedings are pending in state court. *See* Herr, *Multidistrict Litigation Manual* § 5:25 (2014).

When the transferee court has determined that consolidation is appropriate, it has decided that the "just and efficient conduct" of the litigation requires that the consolidated claims and cases proceed together for pretrial purposes, as one unit. 28 U.S.C. § 1407(a). Indeed, a principal aim of centralized MDL proceedings is to prevent the "needless duplication of effort" that would result if each transferred action were instead to proceed on its own separate course. S. Rep. No. 90-454, at 4 (1967). The district court—not the litigants or the court of appeals—is uniquely positioned to survey the litigation and determine whether treatment as a single,

consolidated unit is warranted. *See FedEx Ground Package Sys.* v. *United States JPML*, 662 F.3d 887, 890 (7th Cir. 2011) ("'[I]n most instances the transferee judge has an acute sense about the procedural steps necessary to advance the litigation in the fairest and most efficient way.'"); *see also In re New Cingular Wireless, PCS Data Servs. Litig.*, 988 F. Supp. 2d 1375, 1376 (J.P.M.L. 2013) ("The extent to which pretrial proceedings are coordinated or consolidated in the transferee court ... is best addressed by the transferee judge.").

The transferee court's decision to bind related claims together for consolidated treatment during the pretrial phase of proceedings should not be undone by immediate appeals from the dismissal of fewer than all of the consolidated claims. Such a dismissal is not a final decision in the sense required by Section 1291. Far from leaving "nothing for the court to do," *Catlin*, 324 U.S. at 233, it is merely one step in the complex pretrial management required of the transferee court. For example, when the district court grants in part and denies in part a motion to dismiss consolidated claims, it has effectively determined that discovery may be appropriate as to some of the claims; other pretrial proceedings may also remain, including class certification, appointment of (non-interim) class counsel, and summary judgment on other claims, which by definition involve common questions of fact. Only after the termination of such pretrial proceedings can the district court be said to have "'disassociate[d] itself'" from the consolidated litigation. *Mohawk*, 558 U.S. at 106.

As set forth in more detail below (at 43-47), petitioners' contrary rule—that consolidation does not affect finality, even in multidistrict litigation—would vitiate the efficiencies the MDL procedure is intended to create and would invite the ills the final judgment rule

seeks to eliminate. Under petitioners' approach, the district court's resolution of any individual set of claims would immediately occasion appellate review, despite the district court's ongoing efforts at "centralized management" of other closely related claims. H.R. Rep. No. 90-1130, at 2. Rather than "conservation of judicial energy" and "elimination of delays," *Catlin*, 324 U.S. at 234, petitioners' rule would require the court of appeals to reconsider the underlying controversy each time an appeal was taken. Each seriatim appeal would require the district court to consider whether to forge ahead or await further appellate guidance. Rather than respect "the ability of district judges to supervise litigation," *Richardson-Merrell*, 472 U.S. at 430, petitioners' rule would threaten interference with the district court's efforts to manage and resolve what are among the most challenging proceedings a court may encounter.

b. There is no unfairness in requiring parties who benefit from the consolidated treatment of their claims in an MDL to encounter the occasional inconvenience associated with consolidated proceedings. Since Congress created the MDL system in 1968, that system has provided litigants with both benefits and costs. On the one hand, plaintiffs and defendants can pool resources, avoid the costs of duplicative pretrial proceedings, minimize the discovery burdens on non-parties, lessen the risks of conflicting rulings in different courts, and facilitate settlements. On the other hand, consolidation of transferred actions "can change the rights of parties considerably." Gerson, Note, *The Appealability of Partial Judgments in Consolidated Cases*, 57 U. Chi. L. Rev. 169, 182 (1990). Parties may have to litigate outside their preferred venue, and the appointment of lead counsel may "prevent each litigant from conducting his case as he wishes." *Id.* Consolidation for centralized

pretrial management alters standard single-action litigation in the interests of efficiency and judicial economy, and district courts are charged with managing the resulting trade-offs in any particular litigation.

Here, for example, petitioners sought consolidation to avail themselves of the benefits that consolidation brings. *See supra* pp. 8-9. Petitioners then successfully moved to be designated as interim lead plaintiffs for a putative class of bondholders. JA288-293. Petitioners' counsel also "entered into a joint prosecution agreement" with the other interim lead counsel, which meant pooling resources to find "consulting experts," prepare "a response to [the] motion to dismiss," and assess "the ongoing disclosures of new factual information relating to the litigation." Pls.' Mot. 3-4. Petitioners thus recognized the benefits of consolidation: close and efficient cooperation with other plaintiffs and efficient judicial management. Those factors now counsel against petitioners' effort to obtain separate early consideration of their individual case on appeal, despite the pendency of other putative bondholder class actions asserting causes of action in addition to a federal antitrust claim, as well as additional complaints by other plaintiffs raising the same federal antitrust claim in the MDL.

C. Petitioners' Rule Is Inconsistent With The Treatment Of Consolidated Actions As One Unit In Other Appellate Jurisdiction Contexts

Consolidated cases are treated as a single unit in other appellate jurisdiction contexts; respondents' position thus has the virtue of consistency with other relevant rules. For example, Federal Rule of Appellate Procedure 4(a)(4) provides that the time for appeal runs from the date on which certain post-judgment motions are resolved. Courts have uniformly ruled that

the time under Rule 4(a)(4) does not begin to run until all such post-judgment motions are resolved in the consolidated litigation as a whole. *See Doe* v. *Howe Military Sch.*, 227 F.3d 981, 985 (7th Cir. 2000) ("the filing of a timely motion under Fed. R. Civ. P. 59(e) by one party suffice[s] to toll the time for filing a notice of appeal for all parties" in consolidated litigation); *Advey* v. *Celotex Corp.*, 962 F.2d 1177, 1180 (6th Cir. 1992); *see also Harcon Barge* v. *D&G Boat Rentals*, 746 F.2d 278, 288 (5th Cir. 1984) (treating consolidated cases as one unit for purposes of Rule 4(a)(4)), *aff'd*, 784 F.2d 665 (5th Cir. 1986) (en banc).

Similarly, Rule 4(a)(3) provides that when "one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed." Courts have recognized that the provision applies across consolidated cases, so that a notice filed in one case starts the 14-day clock for a notice to be filed in another case consolidated with it. *See, e.g.*, *EEOC* v. *West La. Health Servs.*, 959 F.2d 1277, 1280-1281 (5th Cir. 1992); *Jackson Jordan, Inc.* v. *Plasser Am.*, 725 F.2d 1373, 1374 (Fed. Cir. 1984).

Finally, Rule 4(a)(1) extends the 30-day period for filing an appeal to 60 days when the federal government is a party. Several courts have held that when a case between private parties is consolidated with a case involving the government, the 60-day deadline applies to all the consolidated cases. *See, e.g.*, *Cablevision Sys. Dev.* v. *MPAA*, 808 F.2d 133, 135 (D.C. Cir. 1987); *In re Perry Hollow Mgmt.*, 297 F.3d 34, 39 (1st Cir. 2002); *In re Adams Apple*, 829 F.2d 1484, 1487 (9th Cir. 1987); *Donovan* v. *Tierra Vista, Inc.*, 796 F.2d 1259, 1260 (10th Cir. 1986). What all of these cases recognize is that, for

various purposes of appellate jurisdiction, consolidated cases should be treated as a single unit of litigation.

D. Petitioners' Contrary Doctrinal Arguments Are Meritless

1. Petitioners suggest (Br. 23) this Court has already decided the question presented in *Johnson* v. *Manhattan Railway Co.*, 289 U.S. 479 (1933), which petitioners read as establishing that "consolidated actions retain their separate identities." *Johnson*, however, does not address the finality requirement in Section 1291.

In *Johnson*, parties seeking to challenge prior orders in a receivership suit brought a new action before a different judge, who consolidated the second suit with the first, which would have conceivably permitted the parties to circumvent the formidable barriers that otherwise prevent collateral attack on prior judgments. 289 U.S. at 492-494. The consolidation order was reversed by the court of appeals, *id.* at 496, and its propriety was not before this Court, *see id.* at 494 (noting that review was not granted as to "the reversal of the consolidating decree"). In dictum, the Court observed that generally "consolidation is permitted as a matter of convenience and economy in administration, but does not merge the suits into a single cause, or change the rights of the parties," and thus that it would not have "alter[ed] the nature of the attack" on the prior judgment. *Id.* at 496-497. Whether the consolidated suit was a collateral or direct challenge had nothing to do with finality. *See, e.g., Ivanov-McPhee* v. *Washington Nat'l Ins.*, 719 F.2d 927, 929 n.1 (7th Cir. 1983) (*John-*

son "did not involve any issue relating to the finality of a judgment as a predicate for appeal").[8]

Petitioners claim (Br. 24-25) that Rule 42(a) incorporates *Johnson*. But even if *Johnson* could be read as broadly as petitioners contend, Rule 42(a) did not codify pre-Rules authority in that respect. The Advisory Committee note expressly states that "in so far as the" predecessor consolidation statute at issue in *Johnson* "differs from this rule, it is modified." Fed. R. Civ. P. 42 advisory committee's note; *see Ringwald* v. *Harris*, 675 F.2d 768, 771 n.4 (5th Cir. 1982) (emphasizing the danger of relying on pre-Rules authority in interpreting Rule 42(a)).[9] And as particularly relevant here, the Advisory Committee note to Rule 42 states that "[f]or the entry of separate judgments, see Rule 54(b)." The Committee's note implies that although "consolidation may not in every respect merge separate actions into a single suit," it may "cause otherwise separate actions to

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[8] Petitioners also rely (Br. 23-24, 27) on *Mutual Life Insurance Co.* v. *Hillmon*, 145 U.S. 285 (1892), but that case is no more helpful to them. The Court held there that consolidation did not alter the number of peremptory challenges available to each of the defendants. According to the Court, a defendant may not "be deprived, without its consent, of any right material to its defence, whether by way of challenge of jurors or of objection to evidence." 145 U.S. at 293. Again, whether a defendant may be deprived through consolidation "of any right material to its defence" is quite different from whether consolidated cases should be treated as a single unit, while consolidated, for purposes of appellate jurisdiction.

[9] The drafting history petitioners cite (Br. 25) suggests that Rule 42 was modified to *remove* the proposed limitation that only actions that could have been "originally ... joined in a single action" could be consolidated, and thus to *expand* the power of consolidation. That hardly supports petitioners' view of the limited effect of consolidation on finality.

thenceforth be treated as a single judicial unit for purposes of Rule 54(b)." *Ringwald*, 675 F.2d at 771.

Finally, petitioners' overreading of *Johnson* is inconsistent with this Court's treatment of consolidated cases as a single unit in other situations. In *Bowsher* v. *Synar*, 478 U.S. 714 (1986), members of Congress and a union brought two separate suits challenging the constitutionality of the same federal statute. The district court consolidated the cases and, citing *Johnson*, conducted a separate standing inquiry for the plaintiffs in each case. *Synar* v. *United States*, 626 F. Supp. 1374, 1379 (D.D.C. 1986) (per curiam). On direct appeal, this Court concluded "that members of the Union" had standing and thus there was no need to "consider the standing issue as to the Union or Members of Congress." 478 U.S. at 721. As the Court recognized in *Bowsher*, consolidated cases may be treated as one unit for at least some purposes. *See also Secretary of Interior* v. *California*, 464 U.S. 312, 319 n.3 (1984); *Sandwiches, Inc.* v. *Wendy's Int'l*, 822 F.2d 707, 710 (7th Cir. 1987) ("We need not say that [*Bowsher* and *California*] have overruled *Johnson* in silence to conclude that 'consolidations' in a district court merge the case for at least some jurisdictional matters.").

2. Petitioners also argue (Br. 19-20) that requiring them to wait would be inconsistent with Section 1407 itself. Petitioners correctly observe that Section 1407 applies only when there are multiple "actions" that raise common questions. But Section 1407's text does not address whether those actions, once consolidated, should be treated as one unit for finality purposes during the consolidation.

Nor does this Court's decision in *Lexecon, Inc.* v. *Milberg Weiss Berhad Hynes & Lerach*, 523 U.S. 26

(1998), bear on the finality of judgment. *Lexecon* holds that, as Section 1407(a) plainly says, a transferred "action" that is not terminated during pretrial proceedings must be returned to its home district. *See id.* at 34. Just as an action stands alone before it is consolidated for pretrial proceedings under Section 1407, it again stands alone if remanded. The relevant question here is whether, while the consolidated litigation is ongoing, the parts are divisible from the whole for purposes of the final judgment rule. *Lexecon* does not answer that question.

3. Finally, petitioners contend (Br. 26) that treating actions consolidated for pretrial proceedings as one for purposes of the final judgment rule, as long as they remain consolidated, would be inconsistent with "the structure of the Federal Rules."

Petitioners frame the question as one of merger (Br. 26), *i.e.*, whether "[p]ermitting parties to merge multiple cases into a single action via consolidation" would "permit them to circumvent" the limits of the joinder rules. But allowing *the district court* to consolidate actions under Rule 42(a) or Section 1407 is quite different from allowing permissive joinder *by the parties* under Rule 20, and petitioners identify no persuasive reason to think that a district court lacks the power to achieve by order what parties may not do by pleading.

In any event, the Court need not resolve the metaphysical debate of whether consolidation "merges" many actions into one. Even if cases retain their individual character in some respects while they are consolidated, consolidation still binds the cases together in a way that can affect procedural disposition, including the timing of appeals. *See* Gerson, 57 U. Chi. L. Rev. at

182 ("If the courts never allowed consolidation to change the rights of parties, they would be unable to move consolidations along as procedural units.").

The Court should therefore decline petitioners' broad invitation (Br. 27) to opine on the nature and consequences of consolidation for all purposes. *See Sandwiches*, 822 F.2d at 709-710 ("[T]here are several kinds of consolidations. Generalizations that assume all consolidations are of one flavor do not always carry the day." (citations omitted)); *Ringwald*, 675 F.2d at 770 n.4 (discussing Wright & Miller's view that "there are distinctly different kinds of 'consolidation'"). The Court need only hold that consolidation for pretrial purposes affects the time for taking an appeal as of right while pretrial proceedings are ongoing.

That rule is entirely consistent with the relevant Federal Rules of Civil Procedure. Rule 54(b)—the single most important provision in the Rules for entry of judgment on fewer than all the claims in a proceeding—has been uniformly read to permit entry of judgment in a consolidated "action." Any contrary reading is indefensibly narrow (*see infra* p. 39), as is petitioners' attempt to read "action" in the Rules to refer always and only to an individual case, never a consolidated one. Rule 16(a) authorizes the district court to schedule a pretrial conference in "any action" pending before it. Petitioners could hardly contend that Rule 16 forbids a district court from conducting a single pretrial conference for a *consolidated* action and requires separate conferences for each transferred case in an MDL. Nor could petitioners reasonably contend that a transferee court is required to enter multiple protective orders—one for each of the consolidated proceedings. *See* Fed. R. Civ. P. 26(c)(1) (allowing for the entry of a protective order in "the action"); *see also, e.g.*, Fed. R. Civ. P.

26(b)(2)(C)(iii) (mandatory limits on discovery in "the action"). It would defeat the purpose of *consolidated* pretrial proceedings under Section 1407 if each of hundreds or thousands of transferred actions in an MDL proceeded separately for discovery.

II. Early Appellate Review While Consolidated Proceedings Are Ongoing Is Available At The Sound Discretion Of The District Court

The discretionary procedures of Rule 54(b) and Section 1292(b), not an appeal as of right under Section 1291, are the appropriate avenues for appeals while consolidated proceedings are ongoing. For years, lower courts have made effective use of these mechanisms to permit appeals that satisfy the relevant criteria and thereby have prevented the hardships that petitioners contend would otherwise accompany routine application of the final judgment rule in multidistrict litigation. Under petitioners' rule, the only additional appeals that would reach the circuit courts would be those the district courts adjudge undesirable while consolidated proceedings are ongoing. Those are hardly the types of cases that should clog the appellate courts.[10]

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[10] *See, e.g., Pitzer* v. *City of E. Peoria*, 2010 WL 4879077, at *2 (C.D. Ill. Nov. 18, 2010) ("[A] 54(b) certification here would waste, rather than conserve judicial resources."); *UniCredito Italiano* v. *JPMorgan Chase Bank*, 288 F. Supp. 2d 485, 506 (S.D.N.Y. 2003) ("The dismissed and remaining claims here arise from essentially the same factual allegations; judicial economy will best be served if multiple appellate panels do not have to familiarize themselves with this case in piecemeal appeals.").

A. Rule 54(b) Allows District Courts To Dispatch Early Appeals When Appropriate

Under Rule 54(b), a district court may enter partial final judgment as to fewer than all claims or all parties when the court determines that "there is no just reason for delay." In other words, a party whose claims are dismissed from consolidated proceedings may appeal when the district court finds that "'the interest of sound judicial administration'" and "the equities involved" so require. *Curtiss-Wright*, 446 U.S. at 8.

"The timing of such a release is, with good reason, vested by the rule primarily in the discretion of the District Court[.]" *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 437 (1956). It is the district court, not the court of appeals or the parties, that is "'most likely to be familiar with the case and with any justifiable reasons for delay,'" *Curtiss-Wright*, 446 U.S. at 10, and thus it is the district court that Congress chose "to act as a 'dispatcher,'" *id.* at 8, to identify those instances when the interest of particular litigants in an early appeal outweighs the systemic costs of piecemeal appellate proceedings. *See id.* at 12 ("[T]he task of weighing and balancing the contending factors is peculiarly one for the trial judge, who can explore all the facets of a case."); 15A Wright et al., *Federal Practice and Procedure* § 3914.7 (2d ed. 1992) ("The choice to use the district judge as the 'dispatcher' who determines the desirability of immediate appeal takes advantage of the judge's close familiarity with the case." (footnote omitted)); *see also Spraytex*, 96 F.3d at 1382 ("The need for immediate appeal and the policy against piecemeal review can be weighed by the district court, subject to our review.").

Rule 54(b) does not obviate the need for a final judgment, which remains "a basic requirement for an appeal." *Sears*, 351 U.S. at 438. Rather, the Rule was adopted as a way to "administer[] that requirement in a practical manner in multiple claims actions," so the district court may "properly tim[e] the release of final decisions in multiple claims actions." *Id.* When the district court finally resolves a subset of claims, and it determines that those claims are "separable from the others remaining to be adjudicated ... such that no appellate court would have to decide the same issues more than once even if there were subsequent appeals," *Curtiss-Wright*, 446 U.S. at 8, Rule 54(b) permits the court to certify that its work is done on those claims and that an appeal is ripe.

Many courts have recognized that this discretionary route to early appellate review significantly diminishes any undesirable hardship the final judgment rule may otherwise pose to particular litigants in complex modern litigation. *See, e.g.*, *In re Refrigerant Compressors Antitrust Litig.*, 731 F.3d 586, 592 (6th Cir. 2013) (even if litigants "would experience hardship if they had to wait until the end of pretrial proceedings to appeal," "other routes to an appellate court ordinarily will reduce any hardship that [litigants] might face"); *see also Page Plus of Atlanta* v. *Owl Wireless*, 733 F.3d 658, 659, 660 (6th Cir. 2013) (Rule 54(b) is a "safety valve[]" that permits "appeals where the benefits of an immediate appeal ... outweigh the costs"); *Jordan* v. *Pugh*, 425 F.3d 820, 829 (10th Cir. 2005) ("Partial final judgment [under Rule 54(b)] is intended to serve the limited purpose of protecting litigants from undue hardship and delay in lawsuits involving multiple parties or multiple claims."); *SEC* v. *Capital Consultants*, 453 F.3d 1166, 1173-1174 (9th Cir. 2006) (similar).

B. District Courts Make Effective Use Of Rule 54(b) In Consolidated Litigation

1. District courts have proven adept at using Rule 54(b) to identify and certify those limited portions of consolidated proceedings for which an immediate appeal is warranted, even while litigation in the rest of the consolidated proceedings remains active. *See, e.g., In re Peanut Crop Ins. Litig.*, 524 F.3d 458, 469-470 (4th Cir. 2008). Indeed, given the complexity of the substantive legal issues and the procedural posture of the cases, Rule 54(b) certification is particularly warranted in MDLs, as transferee courts have frequently recognized. *See, e.g., Hill* v. *Henderson*, 195 F.3d 671, 677 (D.C. Cir. 1999) (MDL courts have "favored certification by the transferee court of potentially outcome determinative rulings for immediate, consolidated appeal").[11] Appellate decisions routinely confirm that Rule 54(b) is the proper mechanism for dispatching an early appeal in those circumstances.[12]

The need for district court discretion over such decisions is particularly compelling in MDLs because Section 1407 grants the JPML and district courts "the

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[11] Rule 54(b) has also been effectively used to dispatch early appeals in litigation consolidated under Rule 42(a). *See, e.g., Allen* v. *Mayberg*, 2014 WL 2526125, at *1-2 (9th Cir. June 5, 2014); *Bayer Healthcare Pharm.* v. *Watson Pharm.*, 713 F.3d 1369, 1373 n.3 (Fed. Cir. 2013); *Massey, Inc.* v. *Moe's Sw. Grill*, 565 F. App'x 821, 823 (11th Cir. 2014) (per curiam); *In re Gentiva Sec. Litig.*, 2 F. Supp. 3d 384, 390-391 (E.D.N.Y. 2014).

[12] *See, e.g., Blackman* v. *District of Columbia*, 456 F.3d 167, 175 n.9 (D.C. Cir. 2006); *Trinity Broad.*, 827 F.2d at 675; *see also Spraytex*, 96 F.3d at 1382 (no appellate jurisdiction without Rule 54(b) certification); *accord Bergman* v. *City of Atl. City*, 860 F.2d 560, 563 (3d Cir. 1988); *Hageman* v. *City Investing*, 851 F.2d 69, 71 (2d Cir. 1988); *Huene*, 743 F.2d at 705; *Ringwald*, 675 F.2d at 771.

power to consolidate cases and then manage them." Gerson, 57 U. Chi. L. Rev. at 190. In MDLs, "district courts continually evaluate the benefits and costs of joint proceedings," and "[t]hey can draw on this knowledge when making finality determinations." *Id.*; *see* Heyburn, *A View from the Panel*, 82 Tul. L. Rev. 2225, 2243-2244 (2008) ("A singular reason for our overall success in MDL cases is the quality of experience, motivation, organizational ability, and sheer tenacity that transferee judges bring to the process. Handling one (or more) of these difficult groups of cases is perhaps the greatest challenge that could be thrust upon a federal judge."). Rule 54(b) lodges the discretion to dispatch early appeals in precisely the courts "best able to evaluate the [e]ffect of an interim appeal on the parties and on the expeditious resolution of the entire action." *Huene* v. *United States*, 743 F.2d 703, 705 (9th Cir. 1984).

Often, as in this case, an MDL court issues successive rulings that dismiss some claims and permit others to go forward. If a plaintiff finds that she no longer has any live claims, she may request certification under Rule 54(b) to permit an immediate appeal, or she may pursue a later appeal under Section 1291 once pretrial proceedings have ended as a result of dismissal or remand of the other cases in the MDL. *See, e.g.*, *In re Loestrin 24 FE Antitrust Litig.*, 2014 WL 4368924, at *13 n.19 (D.R.I. Sept. 4, 2014) (inviting a motion for interlocutory appeal after one consolidated class's sole claim—a federal antitrust claim—was dismissed); *In re Mortgage Elec. Registration Sys. Litig.*, 2011 WL 4550189, at *12 (D. Ariz. Oct. 3, 2011) (dismissing all claims in 72 of the constituent cases and certifying appeal under Rule 54(b)). Placing discretion over interim

appeals in the hands of district court judges fits seamlessly with the MDL structure.[13]

2. Petitioners contend (Br. 39-47) that Rule 54(b) applies only to each individual constituent action in consolidated proceedings and thus is inapplicable when—as here—the district court dismisses all the claims in one of the constituent cases. That is incorrect, and it is telling that petitioners fail to identify any authority supporting their view.

Petitioners rely heavily on the use of the word "action" in Rule 54(b), which provides for the entry of partial final judgment in "an action." That term, however, is readily understood to encompass the entire consolidated litigation, rather than the constituent cases consolidated within that unit. *See supra* p. 33; Gerson, 57 U. Chi. L. Rev. at 180 ("A 'literal' reading of the rules simply does not resolve whether Rule 54(b) applies to consolidated cases."). Similarly, petitioners say (Br. 43) that Rule 54(b) does not apply when all of the claims in an action have been dismissed—as, for example, when the district court dismissed petitioners' sole claim. But that focus is again too narrow. Viewing the consolidated proceedings as a whole, Rule 54(b) allows for early

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[13] District courts overseeing MDL proceedings often certify appeals under Rule 54(b). *See Food Lion*, 73 F.3d at 533 (encouraging transferee courts to consider use of Rule 54(b) in MDL proceedings); *see also, e.g.*, *In re Terrorist Attacks on Sept. 11, 2001*, 714 F.3d 659, 672 (2d Cir. 2013); *In re Bank of Am. Sec., Derivative, & ERISA Litig.*, 2013 WL 5933649, at *3 (S.D.N.Y. Nov. 5, 2013); *In re FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 2012 WL 1580665, at *5 (E.D. La. May 4, 2012); *In re ClassicStar Mare Lease Litig.*, 2012 WL 1080569, at *3 (E.D. Ky. Mar. 30, 2012); *In re Packaged Ice Antitrust Litig.*, 2011 WL 6209188, at *24 (E.D. Mich. Dec. 13, 2011); *In re MTBE Prods. Liab. Litig.*, 2010 WL 1328249, at *5 (S.D.N.Y. Apr. 5, 2010), *aff'd*, 725 F.3d 65 (2d Cir. 2013).

appellate review of a judgment disposing of some claims while part of an action involving other consolidated claims remains ongoing.

Petitioners also observe (Br. 41-42) that Rule 54(b) was intended to permit district courts greater leeway to deal "with difficulties arising from the joinder of disparate claims" within a single action. If anything, the Rule's purpose of providing flexibility in multiclaim actions favors reading it to apply to consolidated proceedings as well, where claims can be even more disparate.

Petitioners fall back (Br. 44-46) on the claim that the Rules Enabling Act, 28 U.S.C. § 2072, compels their reading of Rule 54(b). That simply begs the question whether petitioners are entitled to an appeal under Section 1291. If, as many courts have recognized (*see supra* pp. 20-21), dismissal of fewer than all claims in consolidated litigation is not a final decision for purposes of Section 1291, then petitioners have no appeal as of right and Rule 54(b) abridges nothing.

Finally, petitioners point (Br. 46-47) to other mechanisms that district courts can use to manage complex litigation, which supposedly render Rule 54(b) "unnecessary." But the availability of other, additional tools does not render Rule 54(b) superfluous; none of the measures identified by petitioners provides the district court with the same discretion to dispatch early appeals when appropriate. To the contrary, these other measures merely confirm the general thrust of the Federal Rules to afford district courts substantial discretion to oversee complex cases. It would be far more consonant with the architecture of the Rules to permit district courts—as they have traditionally done—to continue exercising control over the time for taking an appeal despite ongoing proceedings on other claims.

3. Here, the district court was well within its discretion to deny entry of partial final judgment on petitioners' claims. Other plaintiffs raise the same or closely related claims in the consolidated litigation, some on behalf of overlapping putative classes. Several plaintiffs contend that their federal antitrust claim is distinguishable from petitioners' dismissed claim; while wrong, that argument has not yet been addressed by the district court. *See supra* pp. 14-15. If granted an immediate appeal now, petitioners would be the only ones taking an appeal on a common claim.[14] Doubtless other appeals would follow raising that exact same and perhaps also a closely related federal antitrust claim. In fact, the inefficiencies of petitioners' piecemeal approach would be far more severe because, in addition to the three sets of consolidated putative class actions and the individual Schwab actions, there are approximately 40 other actions pending below. Approximately 26 of those actions raise federal antitrust claims. *See* Case Chart, Dkt. 574-1 (S.D.N.Y. Aug. 5, 2014); JA300-302. The district court therefore has sensibly suggested that, once it has addressed all of plaintiffs' claims and clarified the legal landscape, it may consider again

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[14] Petitioners' amici—other plaintiffs in the MDL below—take issue with the district court's underlying antitrust decision. That decision is thorough and well-reasoned and has been cited with approval by several other courts. *See* Pet. App. 37a-59a, 192a-200a; *see, e.g.*, Order 4-5, Dkt. 6, *Mayfield* v. *British Bankers' Ass'n*, No. 14-cv-4735 (S.D.N.Y. July 22, 2014). In any event, its merits are not before the Court. At most, amici's efforts to attack the district court's decision in this Court merely confirm how inextricably intertwined petitioners' claims are with the consolidated claims of other plaintiffs, including amici. Petitioners and their amici should travel together, and all of their antitrust arguments should be considered together by the court of appeals at the same point in the proceedings.

whether to enter a partial final judgment as to a subset of claims in an orderly way. JA294. That is exactly the sort of discretionary management best left to the district court.

C. Section 1292(b) Is An Additional Avenue To Early Appellate Review

Any conceivable hardship from requiring particular parties to await the conclusion of consolidated proceedings before taking an appeal is further mitigated by Section 1292(b), which petitioners fail to address. Under that statute, a district court may certify for interlocutory appellate review any "order involv[ing] a controlling question of law as to which there is substantial ground for difference of opinion," when "immediate appeal from the order may materially advance the ultimate termination of the litigation." After certification, "the appellant still 'has the burden of persuading the court of appeals that exceptional circumstances justify a departure from the basic policy of postponing appellate review until after the entry of a final judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 475 (1978).

Section 1292(b) was "[a]dopted with complex litigation in mind," *MCL* § 15.11, to address what Congress perceived as a "recognized need for prompt review of certain nonfinal orders," *Coopers & Lybrand*, 437 U.S. at 474. Like Rule 54(b), it offers a "route[] to an appellate court" before a complete final judgment, and thus "reduce[s] any hardship that plaintiffs might face" if otherwise required to await the complete termination of all proceedings in the district court before taking an appeal as of right. *Refrigerant Compressors*, 731 F.3d at 592. Like Rule 54(b), district courts use this provision effectively in consolidated litigation to permit early appellate consideration of particular legal questions

when doing so would materially advance the termination of the consolidated litigation. *See id.*

As with Rule 54(b), "Congress carefully confined the availability" of early appellate review under Section 1292(b) by interposing the district court as the initial gatekeeper for such appeals. *Coopers & Lybrand*, 437 U.S. at 474; *see id.* ("[T]he discretionary power to permit an interlocutory appeal is not, in the first instance, vested in the courts of appeals. A party seeking review of a nonfinal order must first obtain the consent of the trial judge." (footnote omitted)); *see also* Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607, 611 (1975) (noting "the emphasis in the [drafters'] deliberations on the trial judge's special ability to assess the future course of litigation and, therefore, the efficiency of allowing an immediate appeal"). Congress's choice to rely on the district court, in the first instance, to determine when early appellate review of questions of law may be appropriate confirms what is evident from Rule 54(b) itself: It is the district court, not individual litigants, that is best positioned to evaluate on a case-by-case basis whether the benefits of an early appeal outweigh the costs.

III. Petitioners' Rule Would Cause Delay And Inefficiency With Minimal Countervailing Benefit

A. Petitioners' Approach Diminishes The Court System's Efficiency And Fairness

Petitioners' approach would impose real-world harms on both the court system and litigants.

First, petitioners' approach would cause needless seriatim appeals, clutter appellate dockets, and squander appellate judicial resources. Under their rule, every

time a district court disposes of the claims in an action that is consolidated with others, the affected party has an appeal as of right, notwithstanding that other parties asserting the same or very similar claims are precluded from having their appeals heard at the same time because they have other claims pending. Parties will doubtless feel obligated to attempt to appeal whenever an order even arguably resolves all of their individual claims, lest they forfeit their right to an appeal. There is no reason to expend the appellate courts' limited judicial resources by requiring them to consider successive appeals on the same issue, especially when each involves the same factual scenario and substantially the same underlying legal theories (even if the appellate court ultimately rejects them on stare decisis grounds), or to revisit the same controversy multiple times, rather than confronting it in "a unified package." *Cullen* v. *Margiotta*, 618 F.2d 226, 228 (2d Cir. 1980) (per curiam); *see also supra* pp. 25-26.

Concern for seriatim appeals is why the district court denied petitioners' Rule 54(b) request in this case. JA294; *see supra* pp. 13-14. Although petitioners would like the Second Circuit to consider their federal antitrust claim now, numerous other claims are still pending before the MDL court. Moreover, a number of plaintiffs in the formerly stayed cases maintain (incorrectly) that their federal antitrust claims remain viable. JA314; *see supra* pp. 14-15. If this Court adopts petitioners' rule, the Second Circuit would face at least three different appeals on the federal antitrust issue alone, brought by: (1) petitioners; (2) the Exchange and OTC plaintiffs; and (3) the FDIC, Freddie Mac, and other plaintiffs advancing purportedly distinct antitrust claims.

Second, petitioners' rule would interfere with the power of the district court to manage its docket, undermining this Court's remonstration that questions about timing and docket management are best left to the sound judgment of courts on the front lines of litigation. *See, e.g.*, *Landis* v. *North Am. Co.*, 299 U.S. 248, 254-255 (1936) (Cardozo, J.) (district court has the "power ... to control the disposition of the cases on its docket with economy of time and effort for itself, for counsel, and for litigants" and such decisions are left to "the exercise of [the district court's] judgment"); *cf. Curtiss-Wright*, 446 U.S. at 8 (Rule 54(b) leaves it "to the sound judicial discretion of the district court to determine the 'appropriate time' when each final decision in a multiple claims action is ready for appeal" (quoting *Sears*, 351 U.S. at 435)).

Such interference is particularly unwarranted in the context of MDL proceedings. *See, e.g.*, *In re Asbestos Prods. Liab. Litig. (No. VI)*, 718 F.3d 236, 247 (3d Cir. 2013) (a "sprawling multidistrict matter ... presents a special situation, in which the district judge must be given wide latitude with regard to case management in order to effectively achieve the goals set forth by the legislation that created the" JPML); *see also supra* Part I.B.3. A rule for finality that ignores consolidation is anathema to Section 1407's scheme for streamlining pretrial proceedings. It could also cause serious delay, especially if the district court waits for the appellate court's guidance before moving forward with the litigation. That result would unseat the district court from its role as the "dispatcher" of appeals. *See Curtiss-Wright*, 446 U.S. at 8; *see also In re World Trade Ctr. Disaster Site Litig.*, 469 F. Supp. 2d 134, 144 (S.D.N.Y. 2007) ("Appeals from interlocutory orders prolong judicial proceedings, add delay and expense to

litigants, burden appellate courts, and present issues for decisions on uncertain and incomplete records, tending to weaken the precedential value of judicial opinions.").

Allowing immediate appeals as of right from MDLs could, alternatively, result in the district court staying discovery for just the claims on appeal. But that result is equally undesirable, for it would lead to "placing the [various] cases on different discovery tracks—which would eliminate the efficiency advantages of [a] matter proceeding as an MDL." *In re Refrigerant Compressors Antitrust Litig.*, 2013 WL 4009023, at *5 (E.D. Mich. Aug. 5, 2013). Thus, petitioners' rule would have a significant detrimental impact on the efficiency of MDLs.

Third, petitioners' rule will often permit the party in a consolidated case with the weakest claim and arguments to control how an issue is presented on appeal. As petitioners acknowledge (Br. 36), their approach would not entitle other plaintiffs in this case with antitrust claims to appeal because those plaintiffs have other, live claims pending. There is no compelling reason to allow petitioners—but not other plaintiffs raising the same claim—to take an early appeal, as the Exchange and OTC plaintiffs argued in this case. *See* OTC Pls.' Ltr. 2. Indeed, the first-dismissed party may have been dismissed early precisely because its claims and arguments were the weakest, and its case the narrowest (raising only one among many conceivable claims still being litigated in the consolidated proceedings). Beyond merely being a poor representative, the first

party to reach the court of appeals may have interests quite different from those left behind.[15]

Fourth, petitioners' rule encourages gamesmanship. Instead of the normal approach of having a representative plaintiff bring all class claims at the outset, the rule may encourage plaintiffs' counsel to choose different representatives to assert different claims and then to seek to consolidate them. *See* Gerson, 57 U. Chi. L. Rev. at 182-183 (petitioners' rule "allows parties to effectively unravel consolidated cases; they can pursue separate appeals that may result in duplicative proceedings and piecemeal appeals—the very things that consolidation was designed to prevent"). This scenario is no remote possibility. *See, e.g.*, *Stearns* v. *Select Comfort Retail*, 2009 WL 4723366, at *15 (N.D. Cal. Dec. 4, 2009) (giving credence to defendants' argument that the named plaintiffs made a "strategic decision" to press only a subset of the possible claims on behalf of the class, while filing other claims as individual actions). In the context of this case, strategic "argument splitting" would allow immediate appeal from the dismissal of claims that, if joined at the outset, would have been appealable only after final judgment or pursuant to Rule 54(b) or Section 1292(b). *See* Wolff, *Preclusion in Class Action Litigation*, 105 Colum. L. Rev. 717, 746

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[15] Congress has elsewhere recognized the detrimental effects of having an inadequate representative for a group of litigants. *See, e.g.*, 15 U.S.C. § 78u-4(a)(3)(B) (Private Securities Litigation Reform Act provisions concerning appointment of lead plaintiff). By contrast, petitioners' rule makes it more likely that the plaintiff who represents the MDL before the court of appeals will have a weak case. That plaintiff's appeal would both potentially prejudice the other parties in the consolidated action and deny the court of appeals the opportunity to hear the strongest possible arguments on the issue.

(2005) ("Class counsel sometimes perceive a strategic benefit in pressing only certain legal arguments in their request for relief, deliberately choosing to forgo potentially meritorious claims.").

B. Petitioners' Approach Offers Little Concrete Benefit

Petitioners fail to identify substantial benefits to their rule, particularly when viewed in light of the wide array of problems the rule would cause. The question presented is when—not whether—petitioners and similarly situated parties will have an appeal as of right. If the issue raised by petitioners is truly a significant problem, there is a straightforward solution: This Court, as advised by the appropriate advisory committees, could revise Rule 54(b) and provide that certification is mandatory rather than discretionary in these circumstances. The rulemaking process is the appropriate mechanism for any necessary revisions to Rule 54(b). *See Mohawk*, 558 U.S. at 113 ("[R]ulemaking, 'not expansion by court decision,' [is] the preferred means for determining whether and when prejudgment orders should be immediately appealable." (quoting *Swint* v. *Chambers County Comm'n*, 514 U.S. 35, 48 (1995))). That there has been no such groundswell to revise Rule 54(b)—despite a decades-long circuit split—is telling.

Petitioners are thus left to trot out a parade of speculative horribles, none of which has proven to be a concern in practice. *First*, petitioners raise (Br. 32) the specter that, once this MDL concludes, "post-trial appeals will be heard by as many as ten different circuits." They do not identify even one example of multiple, parallel post-MDL appeals, and in fact courts can and do use Rule 54(b) precisely to avoid that result.

See supra pp. 37-39 & n.13 (noting MDL courts often grant discretionary appeals under Rule 54(b) or Section 1292(b) before remanding); *see also* 17 *Moore's Federal Practice* § 112.06[3] (3d ed. 2014) ("The [JPML] and the courts properly hold the view that if a party wishes to appeal a decision of the transferee court, the better practice is to allow the appeal prior to remand." (citation omitted)); *In re Air Crash off Long Island, N.Y. on July 17, 1996*, 27 F. Supp. 2d 431, 435-436 (S.D.N.Y. 1998).[16]

Second, petitioners point (Br. 31) to the prospect that "discovery and trial preparation effort will need to be repeated" absent an early appeal. But the possibility of repeating trial proceedings cannot categorically outweigh the certainty of repeating appellate proceedings. Otherwise, there would be no federal policy against piecemeal appeals; many cases carry the potential of replicated proceedings if a final decision is reversed on appeal. *See Brunswick Corp.* v. *Sheridan*,

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[16] Respondents are aware of only one instance in which an MDL resulted in appeals to multiple circuits, and in that case there were issues of state law not common to all the consolidated cases. *See FedEx*, 662 F.3d at 889-891. In that circumstance, it makes sense to have transferor courts address questions of state law arising within their respective circuits. Even if the specter of multiple parallel appeals were real, petitioners' approach would do nothing to diminish the problem in cases such as this one. Although petitioners' single antitrust claim has been dismissed, plaintiffs from as many as ten different circuits have coupled their antitrust claims with other claims that could conceivably survive pretrial proceedings. *See* Pet. Br. 32 & n.17. On petitioners' approach, those plaintiffs would have no right of appeal on their antitrust claims until all of their claims have been resolved—potentially after remand to and trial in a court within another circuit. By contrast, under respondents' rule, district courts have discretion to manage their dockets to minimize or eliminate the possibility of such parallel appeals.

582 F.2d 175, 185 (2d Cir. 1978) (Friendly, J.) ("The policy against piecemeal appeals of intertwined claims should not be subverted by the specters of additional trials[.]"); *see also Spiegel* v. *Trustees of Tufts Coll.*, 843 F.2d 38, 46 (1st Cir. 1988) ("Virtually *any* interlocutory appeal from a dispositive ruling said to be erroneous contains the potential for requiring a retrial.").[17]

Moreover, some duplication of effort will often be preferable to the alternative proposed by petitioners, which will frequently warrant staying much or all discovery in the consolidated proceedings during the appeal. Stays of discovery do not come without costs, as appeals can take months, if not years, to resolve. In 2013, it took non-habeas civil suits an average of over

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[17] Petitioners' concerns about being excluded from or having to duplicate relevant discovery (Br. 31) are groundless. The JPML and transferee courts have long recognized that "procedures are available whereby any discovery" already completed in an action "may be made available to all interested parties in all actions." *In re South Cent. States Bakery Prods. Antitrust Litig.*, 433 F. Supp. 1127, 1129 (J.P.M.L. 1977); *see also, e.g.*, *MCL* § 11.455 (in "related cases pending before the same judge," "[i]t may ... be economical for the judges to afford parties in the present litigation access to depositions previously taken in other litigation"); *MCL* § 11.423 (similar). It makes no difference that petitioners' antitrust claim may raise factual issues different from those subject to discovery during the pendency of their appeal, as transferee courts have substantial discretion to manage the case as to both "discovery with respect to any non-common issues" and "discovery on common issues." *In re Chiquita Brands Int'l ATS & S'holders Derivative Litig.*, 536 F. Supp. 2d 1371, 1372 (J.P.M.L. 2008); *see also In re Cessna 208 Series Aircraft Prods. Liab. Litig.*, 560 F. Supp. 2d 1380, 1380, 1381 (J.P.M.L. 2008) (transferring new cases to an MDL that was "at an advanced stage," so that "a single judge ... can structure pretrial proceedings to consider all parties' legitimate discovery needs while ensuring that common parties and witnesses are not subjected to discovery demands that duplicate activity that will occur or has already occurred in other actions").

11 months to go from the notice of appeal to the issuance of a final decision; further, nearly 90% of private civil cases were affirmed. The Second Circuit is typical—the average was 11.5 months and the affirmance rate was 91%.[18] Postponing discovery so that an appellate court can review a decision—which the district court likely did not think worthy of appeal and which the court of appeals will likely affirm—makes subsequent discovery proceedings lengthier and will drain the resources of litigants and the judiciary alike.

Finally, petitioners contend that prohibiting automatic appeal will result in unjustifiable delay for cases such as theirs. Despite four-plus decades of MDLs, petitioners have not put forward a single example of an interim MDL appeal—or any interim appeal in a consolidated case—prejudicially delayed. Petitioners rely (Br. 38-39) on three counterfactuals, which are meant to show that plaintiffs could have been harmed by delay in the absence of a right to immediate appeal. These examples, however, actually confirm the wisdom of leaving decisions about interlocutory review in the hands of district court judges.

Petitioners first point to *In re Katrina Canal Breaches Litigation*, 345 F. App'x 1 (5th Cir. 2009) (per curiam). In that consolidated action, the district court granted interlocutory appeals on over 20 occasions un-

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[18] *See* Administrative Office of the U.S. Courts, *Judicial Business 2013: Statistical Tables—U.S. Courts of Appeals*, tbls. B-4A, B-5, *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/2013/statistical-tables-us-courts-appeals.aspx; *see also* Guthrie & George, *The Futility of Appeal*, 32 Fla. St. U. L. Rev. 357, 360 & fig. 3 (2005) (overall affirmance rate in courts of appeals nearly 90% in early 2000s).

der Rule 54(b) or Section 1292(b).[19] Petitioners are correct that one set of plaintiffs appealed under Section 1291 without invoking Rule 54(b) or Section 1292(b), and the Fifth Circuit permitted the appeal. But given the district court's willingness to grant interlocutory appeals, there is no reason to think that the court would necessarily have forced those plaintiffs to wait years for appellate review.

Petitioners' reliance on *Evans* v. *Akers*, 534 F.3d 65 (1st Cir. 2008), fares no better. Petitioners contend that, had the law of the circuit not permitted an appeal as of right because the proceedings were consolidated for fewer than all purposes, one set of plaintiffs would have had to wait up to a year before taking an appeal. That is not a picture of hardship, and it is questionable as a factual matter.[20] In any event, nothing in that case suggests that the district court would not have used Rule 54(b) or Section 1292(b) in its discretion to mitigate any genuine hardship from the one-year delay, had plaintiffs requested such relief.

Similarly, *DaSilva* v. *Esmore Correctional Services*, 167 F. App'x 303, 307 n.3 (3d Cir. 2006), involved

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[19] *See, e.g.*, Dkts. 2142, 2143, 3245, 3540, 3666, 6733, 1803, 10315, 10725, 11342, 11343, 11656, 11658, 14995, 15218, 16015, 18541, 18601, 19562, 19704, 20085, *In re Katrina Canal Breaches Litig.*, No. 05-cv-4182 (E.D. La.) (granting Rule 54(b) or Section 1292(b) certifications).

[20] Petitioners state (Br. 38) that, by the time one case, *Bunch* v. *W.R. Grace & Co.*, 555 F.3d 1 (1st Cir. 2009), was decided on appeal, the other case, *Evans*, already had been remanded and settled. In fact, the settlement agreement in *Evans* was finalized and executed *after* the First Circuit issued its decision in *Bunch*. *See* Pls.' Mem. 10, Dkt. 235, *Evans*, No. 04-cv-11380 (D. Mass. June 5, 2009). The parties in *Evans* may well have been waiting for a decision in *Bunch* before concluding their settlement.

a scenario where the jurisdiction's case law permitted immediate appeal. As a result, plaintiffs suffered no delay. Petitioners' argument thus rests on the slender reed that the district court hypothetically might have unreasonably refused to certify an appeal under Rule 54(b), even though district courts have certified interlocutory appeals in remarkably similar situations. *See, e.g.*, *In re Bank of Am. Sec., Derivative, & ERISA Litig.*, 2013 WL 5933649, at *3 (S.D.N.Y. Nov. 5, 2013).

After scouring 45 years' worth of MDL dockets, these three cases are apparently the most compelling petitioners can find. This scant support for their position speaks volumes about the lack of need to adopt petitioners' rule constraining the discretion of district court judges over the timing of interlocutory appeals.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C. § 1292. Interlocutory decisions

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights

and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* [t]hat application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the

Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of

the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B) When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

28 U.S.C. § 1407. Multidistrict litigation

(a) When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings. Such transfers shall be made by the judicial panel on multidistrict litigation authorized by this section upon its de-

termination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions. Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated: *Provided, however,* [t]hat the panel may separate any claim, cross-claim, counter-claim, or third-party claim and remand any of such claims before the remainder of the action is remanded.

(b) Such coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation. For this purpose, upon request of the panel, a circuit judge or a district judge may be designated and assigned temporarily for service in the transferee district by the Chief Justice of the United States or the chief judge of the circuit, as may be required, in accordance with the provisions of chapter 13 of this title. With the consent of the transferee district court, such actions may be assigned by the panel to a judge or judges of such district. The judge or judges to whom such actions are assigned, the members of the judicial panel on multidistrict litigation, and other circuit and district judges designated when needed by the panel may exercise the powers of a district judge in any district for the purpose of conducting pretrial depositions in such coordinated or consolidated pretrial proceedings.

(c) Proceedings for the transfer of an action under this section may be initiated by—

(i) the judicial panel on multidistrict litigation upon its own initiative, or

(ii) motion filed with the panel by a party in any action in which transfer for coordinated or consolidated pretrial proceedings under this section may be appropriate. A copy of such motion shall be filed in the district court in which the moving party's action is pending.

The panel shall give notice to the parties in all actions in which transfers for coordinated or consolidated pretrial proceedings are contemplated, and such notice shall specify the time and place of any hearing to determine whether such transfer shall be made. Orders of the panel to set a hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed in the office of the clerk of the district court in which a transfer hearing is to be or has been held. The panel's order of transfer shall be based upon a record of such hearing at which material evidence may be offered by any party to an action pending in any district that would be affected by the proceedings under this section, and shall be supported by findings of fact and conclusions of law based upon such record. Orders of transfer and such other orders as the panel may make thereafter shall be filed in the office of the clerk of the district court of the transferee district and shall be effective when thus filed. The clerk of the transferee district court shall forthwith transmit a certified copy of the panel's order to transfer to the clerk of the district court from which the action is being transferred. An order denying transfer shall be filed in each district wherein there is a case pending in which the motion for transfer has been made.

(d) The judicial panel on multidistrict litigation shall consist of seven circuit and district judges designated from time to time by the Chief Justice of the United States, no two of whom shall be from the same

circuit. The concurrence of four members shall be necessary to any action by the panel.

(e) No proceedings for review of any order of the panel may be permitted except by extraordinary writ pursuant to the provisions of title 28, section 1651, United States Code. Petitions for an extraordinary writ to review an order of the panel to set a transfer hearing and other orders of the panel issued prior to the order either directing or denying transfer shall be filed only in the court of appeals having jurisdiction over the district in which a hearing is to be or has been held. Petitions for an extraordinary writ to review an order to transfer or orders subsequent to transfer shall be filed only in the court of appeals having jurisdiction over the transferee district. There shall be no appeal or review of an order of the panel denying a motion to transfer for consolidated or coordinated proceedings.

(f) The panel may prescribe rules for the conduct of its business not inconsistent with Acts of Congress and the Federal Rules of Civil Procedure.

(g) Nothing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws. "Antitrust laws" as used herein include those acts referred to in the Act of October 15, 1914, as amended (38 Stat. 730; 15 U.S.C. 12), and also include the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13, 13a, and 13b) and the Act of September 26, 1914, as added March 21, 1938 (52 Stat. 116, 117; 15 U.S.C. 56); but shall not include section 4A of the Act of October 15, 1914, as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a).

(h) Notwithstanding the provisions of section 1404 or subsection (f) of this section, the judicial panel on multidistrict litigation may consolidate and transfer

with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act.

Fed. R. App. P. 4. Appeal as of Right—When Taken

(a) APPEAL IN A CIVIL CASE.

(1) *Time for Filing a Notice of Appeal.*

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf—including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error *coram*

nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) *Multiple Appeals.* If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) *Effect of a Motion on a Notice of Appeal.*

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(5) *Motion for Extension of Time.*

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires other-

wise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) *Reopening the Time to File an Appeal.* The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) *Entry Defined.*

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a) does not affect the validity of an appeal from that judgment or order.

* * *

Fed. R. Civ. P. 42. Consolidation; Separate Trials

(a) CONSOLIDATION. If actions before the court involve a common question of law or fact, the court may:

(1) join for hearing or trial any or all matters at issue in the actions;

(2) consolidate the actions; or

(3) issue any other orders to avoid unnecessary cost or delay.

(b) SEPARATE TRIALS. For convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues,

claims, crossclaims, counterclaims, or third-party claims. When ordering a separate trial, the court must preserve any federal right to a jury trial.

Fed. R. Civ. P. 54. Judgment; Costs

(a) DEFINITION; FORM. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings.

(b) JUDGMENT ON MULTIPLE CLAIMS OR INVOLVING MULTIPLE PARTIES. When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) DEMAND FOR JUDGMENT; RELIEF TO BE GRANTED. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) COSTS; ATTORNEY'S FEES.

(1) *Costs Other Than Attorney's Fees.* Unless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney's fees—should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action.

(2) *Attorney's Fees.*

(A) *Claim to Be by Motion.* A claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages.

(B) *Timing and Contents of the Motion.* Unless a statute or a court order provides otherwise, the motion must:

(i) be filed no later than 14 days after the entry of judgment;

(ii) specify the judgment and the statute, rule, or other grounds entitling the movant to the award;

(iii) state the amount sought or provide a fair estimate of it; and

(iv) disclose, if the court so orders, the terms of any agreement about fees for the services for which the claim is made.

(C) *Proceedings.* Subject to Rule 23(h), the court must, on a party's request, give an opportunity for adversary submissions on the motion

in accordance with Rule 43(c) or 78. The court may decide issues of liability for fees before receiving submissions on the value of services. The court must find the facts and state its conclusions of law as provided in Rule 52(a).

(D) *Special Procedures by Local Rule; Reference to a Master or a Magistrate Judge.* By local rule, the court may establish special procedures to resolve fee-related issues without extensive evidentiary hearings. Also, the court may refer issues concerning the value of services to a special master under Rule 53 without regard to the limitations of Rule 53(a)(1), and may refer a motion for attorney's fees to a magistrate judge under Rule 72(b) as if it were a dispositive pretrial matter.

(E) *Exceptions.* Subparagraphs (A)-(D) do not apply to claims for fees and expenses as sanctions for violating these rules or as sanctions under 28 U.S.C. § 1927.

REPLY BRIEF

No. 13-1174

IN THE

Supreme Court of the United States

ELLEN GELBOIM AND LINDA ZACHER, INDIVIDUALLY FOR THEMSELVES AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,
Petitioners,

v.

BANK OF AMERICA CORPORATION ET AL.,
Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

The district court held as a matter of law that no plaintiff in any action in the LIBOR multidistrict litigation (MDL) could have antitrust standing to sue respondents for violations of the Sherman Act. *See* Pet. App. 155a-56a. On that basis, the district court "dismissed the federal antitrust claims in all of the actions." Resp. Br. 11. *See also* Pet. App. 219a; J.A. 60-61 (docket entry 286). Because petitioners' action asserted only an antitrust claim, there is no dispute that their "complaint had been dismissed in its entirety." Resp. Br. 2; *see also id.* 12. The court's docket accordingly provided that petitioners' action was "terminat[ed]." Pet. App. 12a.[1]

For the reasons set forth in petitioners' opening brief, the district court's ruling was both a "final judgment" for purposes of the "final judgment rule" and an appealable "final decision" under 28 U.S.C. § 1291. *See* Pet. Br. 16-29. And because the court dismissed the sole claim in petitioners' "action," the order was not subject to Federal Rule of Civil Procedure 54(b). *See id.* 40-46. Indeed, the district court itself recognized that petitioners could "appeal as of right because their complaint[] [was] dismissed in [its] entirety." Pet. App. 220a.

The Second Circuit held to the contrary that it had the discretion to decline to exercise appellate

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[1] Because the district court did not separately enter judgment, it was entered 150 days later as a matter of law. Fed. R. Civ. P. 58(c)(2)(B). Respondents have abandoned any suggestion that no judgment was entered. *See* Pet. Reply 6 n.1; BIO 23 n.8.

jurisdiction. *Id.* 2a. Respondents supported that rule below, but now abandon it. Resp. Opp. to Motions for Reconsideration 8-10, ECF No. 141, No. 13-3565 (2d Cir. Nov. 27, 2013); Br. 22 n.7.

Respondents' new theory is that the district court's order is never "a final decision, appealable as of right, while the actions remain consolidated." Br. 15. They principally rely on the policy argument that an MDL transferee court must have the discretion to control the proceedings before it, including whether to permit an appeal from a decision dismissing an action. *E.g.*, *id.* 3, 16.

Respondents' arguments lack merit. Policy considerations cannot override a statute granting the courts of appeals jurisdiction over "*all* final decisions" of the district courts, 28 U.S.C. § 1291 (emphasis added), or the plain, established use of the term "action" in 28 U.S.C. § 1407 and the Federal Rules to refer to a single lawsuit—like petitioners'—rather than a group of actions assembled for limited purposes under a pretrial consolidation order.

To the extent respondents' policy concerns have any weight, they are no basis to affirm the court of appeals' judgment. This Court can address all of them by recognizing that transferee courts supervising MDL litigation have many tools to manage their dockets without disregarding statutory appellate rights. For example, a court may defer decision in a particular consolidated action until it is ready to issue a decision in all of them; it may stay an action pending developments in others; and it may order that judgment not be entered after ruling on a dispositive

motion. *See* Fed. R. Civ. P. 58(b)(1). The *only* act by a district court that triggers a statutory right to appeal is *exactly* what the court did here: entering a judgment resolving all of the claims in a complaint and thus terminating the action.

The judgment accordingly should be reversed.

I. The District Court's Order Dismissing Petitioners' Action Was An Appealable Final Judgment And Was Not Subject To Rule 54(b).

In 28 U.S.C. § 1291, Congress provided for an appeal as a matter of right from all "final decisions" of the district courts. The type of order issued in this case—a judgment finally dismissing the action—is the clearest example imaginable of an immediately appealable "final decision." There is nothing left for the district court to do in petitioners' case. *See, e.g.*, *Sullivan v. Finkelstein*, 496 U.S. 617, 628 (1990) (explaining that such judgments are "at the core of matters appealable"); *Catlin v. United States*, 324 U.S. 229, 236 (1945) (explaining that once a motion to dismiss had been granted and judgment of dismissal entered, "clearly there would have been an end of the litigation and appeal would lie").[2]

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[2] While respondents (Br. 21, 25) quote *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100, 106 (2009), as broadly stating that a final judgment "disassociates" the district court from "the proceedings"—which they would read to include all of the MDL litigation in every action—this Court actually explained that a final judgment is one that disassociates the court from "the case."

Respondents' refusal to recognize that the district court's judgment gives rise to a right to appeal is also incompatible with the statute and rules that govern the timing of a Section 1291 appeal from a judgment that "denies all relief" in a civil action. *See* 28 U.S.C. § 2107(a) (setting jurisdictional 30 day notice of appeal deadline from entry of judgment); Fed. R. App. P. 4(a)(1)(A) (implementing Section 2017); Fed. R. Civ. P. 58(b)(1)(C) (requiring clerk to enter judgment promptly when district court "denies all relief") and (c)(2)(B) (making entry of judgment automatic if clerk fails to promptly enter). Respondents must acknowledge that the district court's judgment dismissing petitioners' complaint is a "final decision."[3] But under respondents' rule, a notice of appeal may not be filed until all the pretrial proceedings conclude in every action in the MDL and the period of consolidation ends. Respondents cannot explain how,

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[3] Otherwise, Rule 54(b), on which respondents extensively rely, would not be available. *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 424, 437 (1956) ("The District Court cannot, in the exercise of its discretion, treat as 'final' that which is not 'final' within the meaning of § 1291.").

For the same reason, respondents' expansive reading of Rule 54(b) violates the Rules Enabling Act. *See* Pet. Br. 44-45; *Sibbach v. Wilson & Co.*, 312 U.S. 1, 10 (1941). Respondents argue that their construction of the Rule does not narrow the appellate jurisdiction conferred by Section 1291 because "dismissal of fewer than all claims in consolidated litigation is not a final decision for purposes of Section 1291." Br. 40. But this Court expressly recognized in *Sears* that every judgment finally resolving a claim is a "final decision" under Section 1291. *See* 351 U.S. at 437.

under their rule, the date of the district court's judgment springs forward to the close of the pretrial proceedings in order to facilitate a later appeal.

Respondents argue that the governing provision is not Section 1291 but instead Rule 54(b), under which the putative appellant must ask the district court to issue a separate ruling that its order is immediately appealable because there is no just reason to delay an appeal. But district courts have never had the discretion to decide whether a judgment finally disposing of a case is immediately appealable. *See, e.g.*, *McLish v. Roff*, 141 U.S. 661, 665 (1891) (describing the availability of appeals from final judgments under the Judiciary Act of 1789); Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 Yale L.J. 539, 549 (1932) (explaining that the Judiciary Act continued the English practice of permitting appeals from final judgments at law, and departed from English equity practice by providing for appeals only from final decrees).

Rule 54(b)—which exists to permit *early* appeals before an action is finally resolved, not to delay them afterward, *see* Pet. Br. 15-16—is thus inapplicable by its terms. The Rule "'does not apply to a single claim action.... It is limited expressly to multiple claim actions in which 'one or more but less than all' of the multiple claims have been finally decided and are found otherwise to be ready for appeal.'" *Liberty Mut. Ins. Co. v. Wetzel*, 424 U.S. 737, 742-43 (1976) (quoting *Sears*, 351 U.S. at 434).

Here, the district court dismissed petitioners' single-claim action in its entirety. Respondents argue

to the contrary that *all* the complaints in an MDL are a single action. They thus refer to petitioners suit as "one constituent in a consolidated district-court action," Br. 1, but they conspicuously cite nothing—no statute, rule, or decision—in support of that characterization. *See also id.* 2 ("constituent in a consolidated action" (citing nothing)), 3 &15 ("some of the claims in a consolidated action" (citing nothing either time)), 16 ("one unit of litigation" (citing nothing)).

In fact, the civil Rules uniformly use the term "action" to refer to a lawsuit arising from a single complaint—here, the complaint setting forth petitioners' antitrust claims. *See* Pet. Br. 26-27, 41-42 n.19. From the earliest days of the civil rules it has been clear that the "civil action," Fed. R. Civ. P. 2, is instituted "by filing a complaint with the court," Fed. R. Civ. P. 3. That "civil action" is the "unit" that the courts have always considered—not some other undefined "unit" comprising multiple civil actions. *See, e.g.*, *In re Saco Local Dev. Corp.*, 711 F.2d 441, 443 (1st Cir. 1983) (Breyer, J.) ("Traditionally, every civil action in a federal court has been viewed as a 'single judicial unit,' from which only one appeal would lie."); *see also In re Mass. Helicopter Airlines, Inc.*, 469 F.2d 439, 441 (1st Cir. 1972) ("[T]he literal reading of Rule 54(b) in conjunction with Rules 2 and 3 would foreclose any interpretation which mandates certification [under Rule 54(b)] in all consolidated action settings.").

Respondents' interpretation of the consolidation process is moreover at odds with this Court's precedents, which establish that consolidated actions

retain their separate status. *Johnson v. Manhattan Ry.*, 289 U.S. 479, 496-97 (1933); *Mut. Life Ins. Co. of N.Y. v. Hillmon*, 145 U.S. 285, 293 (1892).[4]

Under the MDL procedures established by Section 1407 in particular, transferred actions are not merged with each other; instead, they are placed together into "consolidated pretrial proceedings"—*i.e.*, a temporary, limited consolidation that does not extend to trial,

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[4] Citing *Bowsher v. Synar*, 478 U.S. 714 (1986), and *Secretary of the Interior v. California*, 464 U.S. 312 (1984), respondents argue that consolidated actions are a single unit for appellate jurisdiction purposes. Not so. Those decisions merely held that the Court could reach the merits in consolidated actions because at least one plaintiff had standing. *See* 478 U.S. at 721; 464 U.S. at 319 n.3. Importantly, the various plaintiffs raised indistinguishable claims for relief. Thus, as long as one plaintiff had standing, the Court's resolution of the merits would not change, and it was unnecessary to resolve the other plaintiffs' standing. The Court did not impute the standing of one plaintiff to the others, much less hold that the consolidated cases were a single "unit" for jurisdictional purposes. By contrast, respondents never address *Butler v. Dexter*, 425 U.S. 262, 267 n.12 (1976), which dismissed an appeal, holding that despite consolidation of actions in the district court, "[e]ach case before this Court . . . must be considered separately to determine whether or not this Court has jurisdiction to consider its merits." To the extent that it remains an open question whether consolidation influences standing, the Court may address it in two pending consolidated cases: No. 13-1138, *Alabama Democratic Conference v. Alabama* and No. 13-895, *Alabama Legislative Black Caucus v. Alabama*. But as of now, no decision of this Court has ever suggested that consolidation in the district court results in a new "unit" for appellate jurisdiction purposes.

judgment, *or appeal*.[5] At the very least, whatever the effect of MDL proceedings "for so long as the action remains consolidated," Resp. Br. 3, once the district court dismissed petitioners' action, the "pretrial" proceedings in that action, as well as its consolidation with the other actions, were concluded. Petitioners accordingly had the right to appeal.

During the period of consolidation, MDL actions retain their separate status. Indeed, respondents seem to recognize as much, at least implicitly. *See, e.g.*, Resp. Br. 9-10 (recognizing the separate status of "an action brought by purchasers of over-the-counter

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[5] In enacting Section 1407, Congress decided (with only limited exceptions not applicable here) not to permit consolidation for all purposes. *See* Pet. Br. 29 n.14. Respondents do not dispute the district court's conclusion that it did not have the authority to consolidate the LIBOR actions "for all purposes." Resp. Br. 9.

Moreover, "a judge deciding whether to consolidate actions for all purposes is necessarily performing a different judicial function than a transferee judge who is supervising coordinated or consolidated pretrial proceedings under Section 1407." *In re S. Cent. States Bakery Prods. Antitrust Litig.*, 433 F. Supp. 1127, 1130 (J.P.M.L. 1977). Respondents are therefore incorrect to rely upon the principle that when complaints are consolidated *for all purposes*, then their appeals must be initiated together under Federal Rule of Appellate Procedure 4. Br. 27-28. As respondents' own cases acknowledge, that "depends on the degree to which [the] cases were consolidated in the district court"—*i.e.*, whether "they merged entirely." *Doe v. Howe Military Sch.*, 227 F.3d 981, 985 (7th Cir. 2000). Where actions are not consolidated "for all purposes"—as in MDL litigation—they are treated separately under Rule 4. *See id.* at 986-87.

LIBOR-based instruments," "an action brought by purchasers of LIBOR-based products on a domestic exchange," and "the present case"), 11 ("The court dismissed the federal antitrust claims in all of the actions[.]"), 12 ("The district court also left in place its stay on other actions[.]"). For all of respondents' emphasis that "[t]he Judicial Panel on Multidistrict Litigation has authority to administer MDL litigation," Br. 4, they ignore the Panel's own recognition that "[t]ransfer under Section 1407 does not transmute all transferred actions into a single action . . . . Instead, the separate nature of actions transferred to an MDL is preserved throughout each action's pendency whether the actions proceed in a coordinated or consolidated manner." *In re: Bear Creek Techs., Inc., ('722) Patent Litig.*, 858 F. Supp. 2d 1375, 1378 (J.P.M.L. 2012).

MDL litigation proceeds accordingly. The consolidated actions retain separate case numbers, separate parties, and separate attorneys. The transferee court manages each of them as a separate action—although it is empowered to do so efficiently. For example, the captions of documents filed in an MDL docket identify the specific actions to which the documents relate. *Compare, e.g.*, J.A. 277 (caption states that the order relates to "All Cases") *with id.* 288 (caption states that the order relates to Case No. 12-cv-1025 (NRB)). When documents relate to multiple actions, they simultaneously are entered on multiple dockets, and thus orders entered in this fashion constitute orders in each individual action. *See, e.g.*, J.A. 27 (docket entry 77 stating that the order was "[d]ocketed in all member and related cases pursuant

to instructions from Chambers). Discovery proceedings in MDL proceedings are routinely handled in the same fashion, through the expedient of multiple captions on a single document.[6]

The statute further provides that the actions must be dismissed individually. Thus, when the transferee district court enters an order dismissing an "action so transferred," it "terminat[es]" *that action*. 28 U.S.C. § 1407(a). "An action is closed by appropriate orders entered in the transferee court, without further involvement by the Panel or the original transferor court." Manual for Complex Litigation (Fourth) § 20.132, at 222 (2004).

Respondents also cannot explain the appealability of judgments in actions that are merely "coordinated," not consolidated, under the Section 1407. Here, for example, the MDL panel transferred "three individual actions brought by the Charles Schwab Corporation and related entities" arising from respondents' manipulation of LIBOR, Resp. Br. 10, but the district court expressly did "not consolidate these actions with the related class action complaints" or with each other. J.A. 285 n.5; Pet. App. 11a (consolidating only "the class action complaints pending in the MDL"); Resp. Br. 9.

The court's dismissal of the Schwab complaints, *see* Pet. App. 219a, is plainly appealable even under

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[6] This lays to rest respondents' argument (Br. 33-34) that the word "action" must be interpreted to include the entire MDL in order to facilitate pretrial management under Rules 16 and 26.

respondents' rule because the Schwab actions were not consolidated with other suits. That result shows how nonsensical respondents' emphasis on consolidation is, because the Schwab complaints allege federal antitrust claims that are functionally identical to petitioners'. *See id.* 37a. Respondents cannot explain the anomaly that their position permits immediate appeals by the Schwab plaintiffs but not petitioners. Correctly understood, there is no difference: the right to appeal turns on the fact that the district court entered a final judgment disposing of the complaints, not on whether the cases were consolidated.[7]

II. District Courts Already Have Discretion To Manage Their Dockets, Including Whether And When To Issue Appealable Final Judgments.

Respondents principally argue that district courts must have the discretion to control MDL litigation, including by determining that rulings disposing of actions ought not be immediately appealed. Resp. Br. 3, 16. As a threshold matter, supposed efficiency concerns cannot override the jurisdictional rules that Congress enacted by statute. *See supra* Part I.

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[7] There is no merit to respondents' reliance on 28 U.S.C. § 1292(b). That statute provides an avenue for appeal from orders that are not "otherwise appealable." It does not purport to define what those orders are. Respondents' position would allow a provision permitting interlocutory appeals to swallow the final judgment rule.

Moreover, despite respondents' rhetoric that permitting immediate appeals of orders dismissing actions will create "delay" and "inefficiency," Resp. Br. 43, they fail to identify *a single case* supporting that claim in practice. The rule that petitioners advocate has long been the law in the great majority of the country. *See* Pet. 9-11 (collecting decisions of the D.C., First, Third, Fifth, Sixth, Seventh, Eighth, and Eleventh Circuits). None of those courts has suggested that it has been inefficient.

The rule has been workable and efficient in multidistrict litigation, in particular. Respondents treat the Multidistrict Litigation Manual as authoritative, Br. 24, but fail to recognize that it explains that when the transferee court grants a defendant's dispositive motion "on all issues in some transferred cases, they become immediately appealable to the circuit having jurisdiction over appeals from the transferee court, while cases where other issues remain would not be appealable at that time." David F. Herr, Multidistrict Litigation Manual § 9:21 (2014).

Conversely, respondents' position creates the serious prospect of gross inefficiency because the same legal question will be appealed to multiple courts of appeals. Regularly, at the conclusion of MDL proceedings, district courts remand actions that include one or more dismissed claims to their originating district courts. *See* Pet. Br. 32-33. In this case, when the pretrial proceedings conclude, actions that have not been dismissed, but that include dismissed antitrust claims, will return to district

courts in *ten* different circuits. *Id.* When final judgments are eventually entered in those actions, the appeals from the district court's dismissal of the antitrust claims will be taken to all those different courts of appeals. It obviously would be vastly more efficient for all appeals from the district court's antitrust judgment to be decided together in the Second Circuit. Respondents' only answer is that Rule 54(b) certification for petitioners and all of the other antitrust plaintiffs should issue essentially as a matter of course to facilitate a single appeal. Br. 48-49. If so, the far more straightforward rule is to hold that the order is appealable as a matter of right.

Delaying an appeal until the end of pretrial proceedings is also inefficient because it raises the prospect that MDL defendants will be subject to multiple rounds of discovery. For example, if the court(s) of appeals reinstate(s) the antitrust claims after the pretrial proceedings conclude, the reinstated plaintiffs obviously will have the right to conduct discovery. *See* Pet. Br. 12-13, 31-33. This would require additional discovery in either the transferor courts (if the cases have been remanded) or the transferee court (if the MDL is reconstituted). Either way, it would impose massive unnecessary costs. Respondents' assertion that excluded parties can share the results of discovery conducted by others, Br. 50 n.17, misses the point. It is unlikely that all of the discovery pertinent to the antitrust claims will adequately be conducted by parties pursuing *other*, non-antitrust claims. Respondents also argue that it would be inefficient for the district court to stay all discovery pending an appeal. *Id.* 50-51. But stays will

not often be necessary. Respondents concede that appeals typically are resolved in less than a year. *See id.* 51. In this case, the district court rejected the antitrust claims on March 29, 2013, and discovery has not yet begun. Had an immediate appeal been permitted, no stay would have been necessary. And appellate courts can, of course, expedite appeals when appropriate; in fact, the Second Circuit does so for all appeals from dismissals under Rule 12(b)(6). *See* 2nd Cir. R. 31.2(b)(1)(B). Moreover, the district court need not stay all discovery pending an appeal: it can permit the discovery relevant to the surviving claims and stay only the discovery related to the antitrust claims—or employ whatever other "pretrial techniques" are appropriate "to efficiently manage this litigation." *E.g.*, *In re: Stanford Entities Sec. Litig.*, 655 F. Supp. 2d 1360, 1360 (J.P.M.L. 2009).

The value of an immediate appeal is especially clear in light of the strength of petitioners' position on the merits. Respondents—all competitor banks—engaged in horizontal price-fixing by collaborating to depress LIBOR, and thus suppress the amount of interest payable on LIBOR-based debt instruments. This practice directly injured plaintiffs holding those instruments by reducing the price they received for the use of their money. The district court acknowledged that such activity violates the antitrust laws *per se*, but nevertheless concluded that such a violation "does not necessarily establish antitrust injury" principally because, the district court found, the LIBOR-setting

process "was never intended to be competitive" since it is a "cooperative endeavor" of the BBA trade association. Pet. App. 44a.[8] The district court's ruling "departed radically from this Court's cases interpreting the antitrust injury requirement," Br. of Mayor & City of Baltimore 2,[9] and disregarded decades of precedent concerning relief for victims who pay more or receive less due to horizontal price-fixing.[10] Appellate review is imperative, and reversal likely.

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[8] *Contra Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982) (holding that trade association activities "can be rife with opportunities for anti-competitive activity."); *Am. Column & Lumber Co. v. United States*, 257 U.S. 377, 409-12 (1921) (affirming permanent injunction against American Hardwood Manufacturers' Association's "Open Competition Plan" because it was used by trade association to control output and price).

[9] *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990) (explaining that "[p]er se and rule-of-reason analysis are . . . methods of determining whether a restraint is 'unreasonable,' but "[t]he purpose of the antitrust injury requirement is different," *i.e.*, to ensure "that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place."); *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472, 482-83 (1982) (holding that courts should not "engraft artificial limitations on the § 4 remedy"; a "plaintiff need not 'prove an actual lessening of competition in order to recover'"; and an "increase in price resulting from a dampening of competitive market forces is assuredly one type of injury for which § 4 potentially offers redress").

[10] *See, e.g.*, *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906) (relief for buyers who pay more due to horizontal price fixing); *Mandeville Island Farms v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235-36 (1948) (relief for sellers

In any event, respondents' policy arguments are *non sequiturs*. Even if this Court agrees that district courts should act as the "dispatchers" of appeals from rulings in MDL actions, Br. 35-36, it does not follow that a final decision dismissing an action from the MDL is not appealable unless certified under Federal Rule of Civil Procedure 54(b). The fact that the district court has discretion to manage its docket does not *ipso facto* convert a plainly final judgment into an interlocutory ruling. Instead, it means that this Court should make clear that district courts in MDL proceedings have wide discretion to issue orders short of dispositive final decisions triggering statutory appeal rights.

As respondents acknowledge (Br. 5-7), the district court can employ an array of tools in the exercise of its discretion. *See, e.g.*, Fed. R. Civ. P. 16(c)(2)(L) (empowering district courts to adopt "special procedures" for complex cases); *In re: Light Cigarettes Mktg. & Sales Practices Litig.*, 856 F. Supp. 2d 1330, 1332 n.2 (J.P.M.L. 2012) ("Each multidistrict litigation is unique, and transferee judges have broad discretion to determine the course and scope of pretrial proceedings."). For example, the court may conclude that the legal issues presented by the consolidated actions are interrelated, so that it would not be

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who receive less due to horizontal price fixing); *see also* 2A Philip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶ 391b (3d ed. 2007) (injuries from horizontal price fixing present "the easy cases" of antitrust injury).

efficient to resolve one action in isolation. In that instance, the district court will not take the inefficient course of dismissing the one action separately from the others; instead, it will decide them together. In turn, if dismissal is granted, the appeals will proceed together rather than separately.

Deferring action is not the court's only option. The district court controls which actions proceed, and on what schedule. If the court prefers, it can stay various actions in order to allow lagging actions to develop. *See, e.g.*, *Clinton v. Jones*, 520 U.S. 681, 706 (1997) ("The District Court has broad discretion to stay proceedings as an incident to its power to control its own docket."); *In re: Stanford Entities Sec. Litig.*, 655 F. Supp. 2d at 1360 (recognizing the court's power to put different actions on different tracks). Or, it can deny a motion to dismiss an action without prejudice, signaling how it intends to rule but stating that it will hear a renewed motion at a later date when all of the actions can be adjudicated at once. Or, the court may issue a ruling granting a dispositive motion in one action, but also ordering that judgment not be entered until all of the actions are ready for a decision. *See* Fed. R. Civ. P. 58(b)(1) (providing that judgment will be entered "unless the court orders otherwise").

A right to appeal will arise only when the district court eventually exercises its discretion to finally dismiss one or more actions. There is accordingly no tension between petitioners' position and "the sound discretion of the district court to identify, in the first instance, when an early appeal is appropriate." Resp. Br. 16.

In this case, the district court determined that it was appropriate to resolve finally whether any plaintiff has antitrust standing to bring a claim. The court no doubt did so because that is an entirely separate question from the other legal issues presented by the litigation. For their part, respondents cannot explain what benefit will accrue if the antitrust appeals in this case are delayed while the district court continues to manage the other civil actions raising distinct claims, such as state law claims for unjust enrichment and claims under the Commodity Exchange Act. None is apparent. *See* Pet. Br. 36. Respondents' position produces not an "occasional inconvenience," Resp. Br. 26, but rather a pointless, multi-year delay.

Indeed, the district court *itself* has never suggested that an immediate appeal of its decision should be precluded because the antitrust standing question is bound up with issues raised by other parties' claims. Respondents reason from the false premise that, in every form of consolidation, the district court "has decided that the cases ought to proceed as one unit of litigation while consolidated." *Id.* 16. MDL consolidation arises not from a broader judgment that the actions should be litigated together in the district court and the court of appeals but instead an initial conclusion that the varied actions involve "common questions of *fact*." *Id.* 3 (citing 28 U.S.C. § 1407(a) (emphasis added)), 7 (citing the

LIBOR MDL order).[11] The district court's subsequent determination to issue a final judgment in one of the actions is a crystal-clear expression of its judgment that all the actions do *not* need "to proceed as one unit."

The district court thus dismissed petitioners' antitrust claim expressly contemplating that the order was appealable as a matter of right. Pet. App. 220a. To be sure, the district court did later deny petitioners leave to appeal under Rule 54(b). J.A. 294. But the court found that petitioners could not satisfy the high standard for Rule 54(b) relief, *see infra* at 23 n.12, only "[i]n light of the court of appeals' dismissal of petitioners' appeal," Resp. Br. 13, because—in the Second Circuit's view—permitting an immediate appeal would be an inappropriate exercise of its discretion. Pet. App. 2a. It would have been surprising for the district court to effectively overturn the court of appeals' judgment on that point and grant petitioners a right to appeal immediately. *See* J.A. 294 ("[G]iven the reaction of the Second Circuit more than once, it truly is time to give it up . . . .").

Nor is there merit to the suggestion (Resp. Br. 15) that appeal should be delayed because some antitrust claims remain unresolved in the district court. The district court's sweeping ruling governs every such claim because it turns on features of LIBOR, which are

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[11] *Contra* Resp. Br. 4-5 (incorrectly stating that MDL proceedings arise from "a constellation of cases arguably presenting common *issues*" (emphasis added)).

common to every action. *See* Pet. App. 12a-13a, 155a-56a; Br. of Mayor & City Council of Baltimore 7-8. Indeed, the court expressly applied the ruling to dismiss *every* antitrust claim in *every* then-pending case. *See* Pet. Br. 7, n.5 (citing J.A. 60-61 (docket entry 286)). For their part, respondents agree that any assertion that an antitrust claim could survive the district court's broad ruling is meritless. Br. 11-12, 41. They stress that "petitioners' federal antitrust claim is virtually identical" to that raised in the other actions. *Id.* 2. And in briefing recently filed in the district court, respondents argued as much. *See* Joint Mem. of Law in Support of Defendants' Motion to Dismiss Direct Action Claims Covered by Prior Rulings 2-5, ECF No. 746, No. 11-md-2262-NRB (S.D.N.Y. Nov. 5, 2014). Thus, the antitrust litigation in the district court is effectively over, and there is no reason to delay an appeal from the district court's antitrust ruling.

Respondents also rely heavily on the principle that interlocutory appeals are inefficient and disfavored. But the final dismissal of an action is—by definition—not interlocutory. *See, e.g.*, 15A Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3914.6 (2d ed.) ("[T]here are far too many cases holding that dismissal of an entire action is final to provide a comprehensive set of citations."). There is nothing left for the district court to do in the case. *See supra* at 3. In any event, neither party's rule produces more or fewer appeals, or even necessarily appeals at different times, because under each party's rule, the district court has control over the timing of appealable judgments. The dispute instead turns on *how* the right to appeal is triggered.

Respondents finally raise the prospect that some plaintiffs will proceed on appeal—including perhaps the weakest ones—while other plaintiffs will remain mired in the district court because their complaints contain other distinct claims that have not been finally resolved. Br. 46. But both parties recognize the same solution to that concern: the district court will grant Rule 54(b) certification to the plaintiffs in the actions that have not been dismissed.

That is the appropriate use of the Rule: there would be no just reason for the plaintiffs remaining in the district court not to be permitted to appeal the dismissal of their claim, given that another appeal on the same issue is proceeding. Thus, in this case, the district court originally contemplated that petitioners would appeal the dismissal of their complaint, and granted Rule 54(b) certification to other plaintiffs whose complaints included antitrust claims. Pet. App. 220a. The district court withdrew that certification only after the Second Circuit held that petitioners could not appeal. *Id.* 222a. If petitioners' appeal is reinstated, there is every reason to believe the district court will permit all of the antitrust plaintiffs to move forward as well.

III. Requiring The Parties To Litigate Whether An Appeal Is Permitted Under Rule 54(b) Will Produce Wasteful Litigation.

Although petitioners' position easily accommodates respondents' policy concerns regarding the need for MDL courts to control the litigation before them, there is an important practical difference between the parties' positions. Respondents' proposed

rule produces unnecessary collateral litigation. Under petitioners' straightforward approach, the district court enters a judgment dismissing a complaint from the MDL when it believes that the legal question before it can appropriately be resolved immediately, including on appeal.

By contrast, adopting respondents' position will require extensive litigation over whether an immediate appeal is appropriate under Rule 54(b). The district court must decide a motion under the Rule, which can require extensive briefing, argument, and analysis. *See, e.g.*, *Krys v. Pigott*, 749 F.3d 117, 126 (2d Cir. 2014) (describing case in which district court issued a partial final judgment under Rule 54(b) in July 2012, the court of appeals vacated and remanded for a more detailed explanation of reasons for the order, and the district court issued a new order, culminating in an appellate decision almost two years later). This case—in which the district court has been forced to resolve repeated requests under Rule 54(b), and respondents suggest that petitioners try yet again—is a perfect example. *See* Pet. App. 219a-21a (Rule 54(b) judgment granted), 222a (then revoked); J.A. 294-96 (then refused); Resp. Br. 41-42. If the district court permits an appeal, then the court of appeals, in turn, must decide whether the district court abused its discretion. *See, e.g.*, *Krys*, 749 F.3d at 126.

The litigation that respondents envision is not only wasteful, it is a complete misfit under Rule 54(b); it is unclear how it would be resolved without the lower courts developing a new and entirely

unpredictable body of law specific to MDL proceedings. In every other context, there is a strong presumption against granting certification under Rule 54(b), precisely because—as respondents emphasize—there is a strong preference against immediate appeals of interlocutory orders.[12] But respondents do not contend that this presumption properly applies to these circumstances. To the contrary, they all but concede that Rule 54(b) certification should effectively be granted as a matter of course to avoid the prospect that a single legal ruling will later produce duplicative appeals in multiple circuits. *See* Resp. Br. 48-49.

Because the district court's order was an appealable final judgment, and because adhering to the plain and settled meaning of the governing statutes and Rule 54(b) fully accommodates the policy concerns raised by respondents, the court of appeals' judgment should be reversed.

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[12] *E.g.*, *Novick v. AXA Network, LLC*, 642 F.3d 304, 310 (2d Cir. 2011) (certification should be granted "sparingly"); *O'Bert v. Vargo*, 331 F.3d 29, 41 (2d Cir. 2003) (certification should be granted "only in the infrequent harsh case").

CONCLUSION

The judgment of the Second Circuit should be reversed.

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AMICUS CURIAE BRIEF

No. 13-1174

In the Supreme Court of the United States

ELLEN GELBOIM, *et al.*,

Petitioners,

v.

BANK OF AMERICA CORPORATION, *et al.*,

Respondents.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE* [1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and organizations of every size, in every industry sector, from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Chamber's members are frequently parties—as both plaintiffs and defendants—in consolidated cases, including multidistrict litigation ("MDL") proceedings instituted pursuant to 28 U.S.C. § 1407. In appropriate circumstances, MDLs and consolidations under Federal Rule of Civil Procedure 42 can promote judicial efficiency and streamline complex litigation by bringing together before a single district court judge multiple cases that present common legal and factual issues, thereby avoiding divergent rulings and duplicated efforts. Realization of these benefits, however, requires that the judge be afforded a degree of discretion and control over the litigation's progress that matches its size and complexity. The Chamber files this brief to explain why petitioners'

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[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* certifies that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the brief's preparation and submission. Counsel consented to the brief's filing in letters that are on file with the Clerk's office.

proposed rule—which would automatically "permit[] appeals from *all* decisions dismissing" complaints within larger consolidated proceedings, Pet. Br. 35–36 (emphasis added)—contravenes the policies and purposes underlying Section 1407 and Rule 42 and, if accepted, would thwart district judges' ability to manage complex cases. The Court should instead adopt a more flexible rule that gives a district judge discretion to determine when partial or piecemeal appeals would further—or hinder—the just and efficient resolution of the *entire* litigation.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Petitioners urge the Court to announce what they call a "clear, categorical" rule: No matter the number of constituent actions in a consolidation proceeding, the interrelationship of those actions, or the extent to which they have been consolidated, a litigant must always have the absolute right immediately to appeal a decision dismissing his complaint on the merits. Pet. Br. 35–36. Clarity, of course, is a good thing—especially when implementing jurisdictional statutes. And as explained below, respondents' proposed rule offers clarity, as well. The problem with petitioners' rule is not that it is *clear*, but that it is *rigid*. And at least in the novel MDL context, rigidity is a bad thing.

Petitioners' rigid rule rests (perhaps not surprisingly) on formalism: (1) Had their individual action *not* been consolidated as part of an MDL proceeding, petitioners say, they would have had a right under 28 U.S.C. § 1291 immediately to appeal the district court's order dismissing their complaint; (2) the "mere fact of consolidation" under 28 U.S.C. § 1407 does nothing to change that re-

sult; and (3) therefore, they must also have a right of immediate appeal within the MDL context. Pet. Br. 10. Petitioners' analysis ignores the realities of MDL litigation, the unique nature of consolidated actions, and the myriad ways in which consolidation can—and in the interest of systemic efficiency must—modify ordinary litigation procedures.

To be clear, the alternative to petitioners' proposal, which would require immediate appeals of every dispositive order within the context of an MDL, is *not* a rule that categorically forbids immediate appeals. To the contrary, the alternative is a rule—no less "clear" than petitioners', only less wooden—that vests discretion in the MDL judge, under Federal Rule of Civil Procedure 54(b) and 28 U.S.C. § 1292(b), to determine, in the context of the larger litigation, when an immediate appeal properly serves the policies of fairness, efficiency, and convenience that underlie Section 1407 and the MDL process.

That flexible approach is consistent not only with Congress's intent in establishing the MDL device, but also with the realities and challenges that attend often-sprawling consolidated litigations. And historical practice demonstrates that judges presiding over MDL proceedings have routinely used Rule 54(b) and Section 1292(b) to balance individual litigants' interests in prompt appellate review with broader systemic considerations—and frequently to permit immediate individual appeals.

Given that petitioners' unconditional rule is incompatible with the realities of complex litigation and unnecessary in light of alternative means of facilitating imme-

diate appeals, it is unsurprising that their position has attained almost no support in the courts of appeals. Indeed, the overwhelming majority rule in cases that have been consolidated for *all* purposes is that an order disposing of fewer than all of the claims and parties is not immediately appealable absent district-court certification. These decisions, which date back decades, are consistent with the final-judgment principle and the policies underlying it. The clear rule that they embrace should be extended to consolidated cases generally—including MDLs—not jettisoned entirely and without good reason, as petitioners urge.

ARGUMENT

I. Petitioners' Unyielding Approach To Determining Finality Is Incompatible With The Flexibility And Discretion Necessary To Effective MDL Case Management.

An MDL is not just a disaggregated collection—or as petitioners say, a "temporary coexistence," Pet Br. 11—of similar cases. Rather, as one court explained it, an MDL "is a special breed of complex litigation where the whole is bigger than the sum of its parts." *In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1232 (9th Cir. 2006).

An MDL's life cycle has three distinct phases. First, the MDL begins—or more precisely is preceded by—multiple separate, plaintiff-v.-defendant "actions" that are "pending in different [federal judicial] districts." 28 U.S.C. § 1407(a). Second, if those separate actions "involv[e] one or more common questions of fact," then the Judicial Panel on Multidistrict Litigation ("JPML")

may order that they be "coordinated" or (as here) "consolidated" before a single federal district judge for pretrial proceedings. *Id.* Finally, "at or before the conclusion of such pretrial proceedings," each action that has not "been previously terminated" (*i.e.*, resolved during the consolidated phase) "shall be remanded" to the judicial district "from which it was transferred." *Id.*

The parties here agree that individual cases come into an MDL separately and that if they leave they do so separately. Thus, as respondents say, a constituent action "stands alone before it is consolidated for pretrial proceedings under Section 1407"—*i.e.*, in the first phase described above—and it "again stands alone if remanded"—*i.e.*, in the third and final phase. Resp. Br. 32. The question that divides the parties is whether, during the second phase—when, as here, the constituent actions are consolidated—the cases remain wholly separate and divisible for appellate purposes, such that a litigant who suffers an adverse judgment *automatically* has an immediate right of review.

That is not a question that can (or should) be answered in the abstract or by resort to theoretical concepts. Rather, it must be answered by reference to the unique nature of MDL proceedings and the practical, on-the-ground realities of consolidated litigation.

A. To Meet the Unique Challenges of Consolidated Litigation, a Judge Tasked With Handling an MDL Needs Significant Management Flexibility.

The MDL device was born of pragmatic concerns—in particular, of a felt need for statutory authority ex-

pressly providing for the consolidation of often large and unwieldy cases that, in the absence of coordinated action, could "disrupt the functions of the Federal Courts." H.R. Rep. No. 90-1130, 1968 U.S.C.C.A.N. 1898, 1899 (Feb. 28, 1968). Congress created the MDL procedure in response to a specific litigation explosion, in which, "[f]ollowing the successful Government prosecution of electrical equipment manufacturers for antitrust law violations, more than 1,800 separate damage actions were filed in 33 Federal district courts." *Id.* That "wave of litigation threatened to engulf" the federal courts, and "[u]nless coordinated action was undertaken it was feared that conflicting pretrial discovery demands for documents and witnesses" would severely compromise the courts' ability to function fairly and efficiently. *Id.*

In response, an *ad hoc* committee of federal judges, operating under the auspices of the Judicial Conference of the United States, stepped in to "restore order to the litigation." *Id.* They did so by, among other things, (1) entering a series of "uniform pretrial and discovery orders," (2) scheduling and holding "[n]ational depositions" directed by a single "[l]ead counsel" on each side of the "*v.*", and establishing "[c]entral document depositories" to house the plaintiffs' and defendants' papers. *Id.* The committee judges deftly managed the sprawling cases, successfully bringing them to conclusion within a span of several years.

Recognizing that the management of those cases, while successful, "entirely depended on the voluntary agreement of all the parties as well as presiding judges," Congress sought to provide a firm statutory footing for future pretrial consolidation. *Id.* The fruit of Congress' labor was 28 U.S.C. § 1407, "[t]he objective of [which

was] to provide centralized management under court supervision of pretrial proceedings of multidistrict litigation to assure the 'just and efficient conduct' of such actions." *Id.*; *see also* John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 Tulane L. Rev. 2225, 2226 (2008) (tracing Section 1407's history and purpose). Since its establishment nearly 50 years ago, "[m]ultidistrict transfer under 28 U.S.C. § 1407 has continued to be an important part of complex litigation management," and it "remains one of the most effective tools for managing cases filed in multiple districts." David F. Herr, *Manual for Complex Litigation 4th* § 20.14, at 308 (2009); *see also* David F. Herr, *Multidistrict Litigation Manual: Practice Before the Judicial Panel on Multidistrict Litigation* § 1:1, at 3 (2014) (noting the "increasing importance [of the JPML] in the efficient handling of certain cases pending in more than one federal district").

Even more so today than in the pre-Section-1407 era, "administering cases in multidistrict litigation is different from administering cases on a routine docket." *In re PPA*, 460 F.3d at 1229. As the JPML recently emphasized, there is no "typical" MDL; rather, "[e]ach multidistrict litigation is unique." *In re Light Cigarettes Mktg. & Sales Practices Litig.*, 856 F. Supp. 2d 1330, 1332 n.2 (J.P.M.L. 2012). As of October 15, 2014, there were 281 active MDL dockets assigned to 212 different judges in 58 different federal judicial districts. U.S. J.P.M.L., *MDL Statistics Report—Distribution of Pending MDL Dockets by District*, *available at* http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-October-15-2014.pdf (visited Oct. 20, 2014). Those 281 MDL dockets account for a total of 397,069 constituent actions, 128,055 of which are currently pending. *Id.* Existing MDLs comprise as few

as one and as many as 8,500 cases and cover a whole host of subject matters, including antitrust, intellectual property, labor and employment, securities, product liability, and even terrorism. *Id.*

Given this variation, and in view of the enormous task that confronts a district judge assigned to manage an MDL, attention to on-the-ground practicalities is paramount. In particular, in order to achieve the efficiency that "Congress established MDL protocols to encourage," an "MDL court[] must be given greater discretion to organize, coordinate and adjudicate its proceedings" than a judge handling a typical one-on-one suit. *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 496 F.3d 863, 867 (8th Cir. 2007) (citation omitted).

B. To Achieve the Benefits of Consolidation, the MDL Judge Is Empowered To Conduct the Proceeding, in Important Respects, as a Single Combined Case.

A common thread running through MDLs of every size and subject matter is that, in important respects, the MDL proceeds as a single combined case. Upon consolidation, "the jurisdiction of the transferor court ceases and the transferee court has exclusive jurisdiction" over all related actions. *Manual for Complex Litigation* § 20.131, at 201. The judge to whom the MDL is assigned will organize the multiple constituent cases under a single "master" docket number and will typically issue a series of "case management orders," applicable to all actions, establishing a uniform schedule for pleadings, discovery, motions, and the like. Often, the judge's "CMO" will require plaintiffs to file a single "master" com-

plaint—and defendants, a "master" answer—and will mandate rigorously coordinated discovery, pursuant to which plaintiffs and defendants must march in lockstep. The judge may, and often will, entertain motions and issue orders applicable to many—or even all—of the constituent cases. *See In re PPA*, 460 F.3d at 1231 (MDL judge can "decide all pretrial motions, including dispositive motions such as motions to dismiss [and] motions for summary judgment" (citations omitted)); *In re Food Lion, Inc., Fair Labor Standards Act Effective Scheduling Litig.*, 73 F.3d 528, 532 (4th Cir. 1996) ("In practice, . . . the vast majority of transferred cases are disposed of completely in the transferee court . . . .").

Why all the "oneness"? As the MDL statute says, "for the convenience of parties and witnesses," as well as "the just and efficient conduct of [the] actions." 28 U.S.C. § 1407(a); *accord, e.g.*, *In re Guidant Corp.*, 496 F.3d at 867 ("Congress established MDL protocols to encourage efficiency."). In particular, "[t]he objective of [MDL] transfer is to eliminate duplication in discovery, avoid conflicting rulings and schedules, reduce litigation cost, and save the time and effort of the parties, the attorneys, the witnesses, and the courts." *Manual for Complex Litigation* § 20.131, at 300. In short, the MDL process serves to minimize "piecemeal litigation" that increases costs and burdens for both litigants and courts. *Multidistrict Litigation Manual* § 3:3, at 22.

Of course, "administer[ing] the proceeding as a whole"—and thereby realizing the benefits that consolidated treatment offers—"necessarily includes keeping the parts in line." *In re PPA*, 460 F.3d at 1232. And keeping the parts in line necessarily requires a few adjustments to typical litigation procedures. To take the

most obvious example, although "[p]laintiffs normally may decide where to file their lawsuits," Section 1407 empowers the JPML to override plaintiffs' venue choices. *In re Refrigerant Compressors Antitrust Litig.*, 731 F.3d 586, 588 (6th Cir. 2013) (Sutton, J.). In particular, Section 1407 provides for transfer of individual actions "to any district," and with respect to any given case, the transferee court "need not be a proper venue," 15 Charles Alan Wright et al., *Federal Practice & Procedure* § 3862 (4th ed. 2014).

Perhaps nowhere is the unitary nature of the MDL process more evident (to both plaintiffs and defendants) than in discovery. One of the principal "objective[s] of transfer is to eliminate duplication in discovery." *Manual for Complex Litigation* § 20.131, at 300. Accordingly, "[i]mplicit in Section 1407 is the assumption that the transferee judge will . . . establish a national unified discovery program to avoid delay, repetition and duplication and to insure that the litigation is processed as efficiently and economically as possible." *In re PPA*, 460 F.3d at 1230 (citation and internal quotation marks omitted). Whatever benefits a unified discovery program may yield, however, come "at a price." *Vioxx Prods. Liab. Litig. Steering Comm. v. Merck & Co.*, Nos. 06-30378 & 06-30379, 2006 WL 1726675, at *3 (5th Cir. May 26, 2006) (per curiam). Put simply, "[c]onsolidated discovery of MDL litigation, with its huge aggregation of cases, sorely taxes the processes attending our traditional binary structure in civil cases." *Id.*

Finally, MDL litigants on both sides of the "*v.*" often forfeit the ability to insist on their own lawyers—and as a result, their own preferred case strategies. District judges presiding over MDLs frequently appoint lead

counsel, or "leadership group[s]," to "orchestrate pretrial litigation for all" similarly situated parties. *In re Genetically Modified Rice Litig.*, 764 F.3d 864, 866 (8th Cir. 2014) (rejecting challenge brought to fee awarded to designated lead plaintiffs' counsel). These lead attorneys, selected from among numerous lawyers representing parties to the case, effectively act as counsel for everyone; they "coordinate[] pretrial discovery, prepare[] for and conduct[] numerous depositions, appear[] before the district court at hearings and status conferences, select[] and prepare[] experts, and perform[] and assist[] with bellwether trials." *Id.*

These modifications of typical litigation procedures exist to serve Section 1407's purpose of maximizing judicial economy and the efficiency of the overall MDL. As explained below, the modest adjustment of an individual litigant's immediate-appeal rights contemplated here—and to be clear, in light of the remaining avenues of appellate review, it is indeed modest—is just another similar accommodation, which is likewise necessary to the realization of the benefits of MDL consolidation.

C. To Manage an MDL Efficiently and Fairly to All Parties, the Judge Must Have the Discretion To Allow—or Disallow—Immediate Appeals in Individual Constituent Cases.

As already explained, in order to manage a consolidated proceeding, "[t]he district court needs to have broad discretion to administer the proceeding *as a whole*, which necessarily includes keeping the parts in line":

> A district judge charged with the responsibility of "just and efficient conduct" of the multiplicity of actions in an MDL proceeding must have discretion to manage them that is commensurate with the task. The task is enormous, for the court must figure out a way to move thousands of cases toward resolution on the merits while at the same time respecting their individuality. . . . For it all to work, multidistrict litigation assumes cooperation by counsel and macro-, rather than micro-, judicial management because otherwise, it would be an impossible task for a single district judge to accomplish. Coordination of so many parties and claims requires that a district court be given broad discretion to structure a procedural framework for moving the cases as a whole as well as individually, more so than in an action involving only a few parties and a handful of claims.

In re PPA, 460 F.3d at 1231–32 (emphasis added).[2]

Just as the MDL process is predicated on functional, practical considerations, so too is the final-judgment rule. This Court has long recognized that "[f]or purposes of appellate procedure, finality . . . is not a technical concept of temporal or physical termination." *Cobbledick v. United States*, 309 U.S. 323, 326 (1940). Rather, it is a

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[2] *See also, e.g.*, *Freeman v. Wyeth*, 764 F.3d 806, 810 (8th Cir. 2014) (noting the "unique problems an MDL judge faces, especially when the MDL litigation involves hundreds of attorneys representing thousands of clients"); *In re Katz Interactive Call Processing Patent Litig.*, 639 F.3d 1303, 1313 (Fed. Cir. 2011) ("In complex cases, and particularly in multidistrict litigation cases, the district court 'needs to have broad discretion to administer the proceeding.'" (quoting *In re PPA*, 460 F.3d at 1232)).

practical—even "intensely 'practical'"—notion. *Matthews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976). In some circumstances, of course, the Court has given 28 U.S.C. § 1291 "a practical rather than technical construction" as a means of expanding the right to immediate appeal. *E.g.*, *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). In others, the Court has invoked practical considerations in the course of insisting on a more robust notion of finality and refusing immediate appeals. *See, e.g.*, *Cobbledick*, 309 U.S. at 325–26.

The point is that the Court has historically—and sensibly—privileged substance and function over form in assessing finality. Petitioners' proposed rule—which would "permit[] appeals from *all* decisions dismissing a complaint on the merits," no matter the degree to which actions have been consolidated, Pet. Br. 35–36 (emphasis added)—pays absolutely no heed to real-world practicalities. The rule is, by petitioners' own description, "categorical." *Id.* at 35.

In the unique circumstances presented here, a proper consideration of the pragmatic concerns that underlie MDL practice, and that have traditionally informed this Court's interpretation of the final-judgment rule, strongly favors respondents' position. The Court's reasoning in *Cobbledick* applies here precisely. There, in refusing to recognize appellate jurisdiction over appeals taken from orders declining to quash subpoenas requiring nonparties to appear before a grand jury, the Court emphasized that "from the very beginning" Congress has "forbidd[en] piecemeal disposition on appeal of *what for practical purposes is a single controversy*." 309 U.S. at 325 (emphasis added). Congress has done so, this Court said, not in pursuit of proper form but, rather, in pursuit

of a "policy" of sound "judicial administration"—and in particular, a policy against a "succession of separate appeals" in the course of a single litigation. *Id.* at 325–26. "To be effective," the Court continued, this "judicial administration" cannot be "leaden-footed"; it must maintain its "momentum," which "would be arrested by permitting separate reviews of the component elements in a unified cause." *Id.* at 325.

Cobbledick highlights a theme that runs throughout this Court's final-judgment jurisprudence—namely, that the finality inquiry does not focus, at least primarily, on an individual case or party. Rather, as the Court there emphasized, the finality requirement serves larger purposes—facilitating sound "judicial administration," ensuring "the effective conduct of litigation," and ultimately, "achieving a healthy legal system." *Id.* at 325–26.[3]

Focusing on the systemic (rather than purely individualistic) considerations that animate this Court's final-judgment cases underscores the problem with peti-

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[3] *See, e.g.*, *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974) ("The inquiry requires some evaluation of the competing considerations underlying all questions of finality—'the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other.'" (citation omitted)); *Gillespie v. U.S. Steel Corp.*, 379 U.S. 148, 152 (1964) ("And our cases long have recognized that whether a ruling is 'final' within the meaning of § 1291 is frequently so close a question that . . . it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the 'twilight zone' of finality."); *Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950) (discussing "considerations that always compete in the question of appealability, the most important of which are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other").

tioners' rigid position, at least as applied in the unique MDL context. As explained above, an MDL proceeding is, in important respects—including venue, case management, and discovery—"for practical purposes . . . a single controversy." *Cobbledick*, 309 U.S. at 325. Granting every MDL litigant the automatic right to appeal the resolution of its individual, constituent action would fatally frustrate the MDL judge's ability to manage the "enormous" task that she confronts. *In re PPA*, 460 F.3d at 1231. As a practical matter, the judge would lose control of the proceedings every time she issued an order dispositive of even one constituent case (perhaps among thousands). The aggrieved individual litigant could then appeal immediately, even if the MDL judge believed that an immediate appeal would materially harm the remaining litigants or complicate the conduct of the overall proceeding. Withdrawing the judge's discretion to prevent the unnecessary balkanization of the MDL would threaten both her ability to move "the cases as a whole as well as individually," *id.* at 1232, and Congress's overriding goals of fairness, efficiency, and convenience. *See, e.g.*, *In re Fema Trailer Formaldehyde Prods. Liab. Litig.*, MDL No. 07-1873, 2010 WL 1410675, at *1 (E.D. La. Mar. 30, 2010) ("This is a massive MDL, and if the Court begins allowing piece-meal appeals of issues applicable to only certain few member cases just to determine the correctness of its Orders therein, progress of this matter will be impeded.").[4]

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[4] There is also a risk that, by frustrating district judges' ability to manage their MDL dockets, petitioners' proposed rule might actually cause judges to deny meritorious dispositive motions. *Cf. In re Franklin Nat'l Bank Sec. Litig.*, 478 F. Supp. 210, 223 (E.D.N.Y. 1979) ("In spite of these persuasive arguments for granting the Government's motion for summary judgment, more practical considera-

The MDL judge is uniquely situated to decide when an immediate appeal in a constituent case "will promote the just and efficient conduct" of the actions generally. 28 U.S.C. § 1407(a). Accordingly, rather than decreeing a wooden, one-size-fits-all rule allowing immediate appeals from every dispositive order in an MDL, the Court should leave the determination of finality to the sound discretion of the MDL judge. As explained in the next Part, judges handling complex MDLs have not hesitated to use their authority under Federal Rule of Civil Procedure 54(b) and 28 U.S.C. § 1292(b) to facilitate immediate appeals where consistent with the fair and efficient conduct of the larger litigation.

II. Because Rule 54(b) And Section 1292(b) Provide MDL Judges Ample Authority To Accelerate Appellate Review Where Appropriate, There Is No Need For An Unconditional Rule Authorizing Immediate Appeals From Every Dispositive Order In Every Constituent Case.

While the unique nature of MDL proceedings generally weighs against permitting immediate appeals of orders addressing only a subset of the claims at issue in the litigation, the final-judgment rule does not bar MDL litigants from seeking prompt appellate review. As in virtually any type of federal litigation, parties to MDLs can seek immediate review under both Federal Rule of Civil Procedure 54(b) and 28 U.S.C. § 1292(b), and district judges may authorize such appeals in appropriate circumstances.

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tions, looking to the posture of this complex multidistrict litigation, require that the motion be denied.").

In light of these two tried-and-true mechanisms, which provide MDL litigants ample opportunities for immediate appellate review, there is simply no need to decree the "categorical" rule that petitioners propose. And to be clear, review under Rule 54(b) and Section 1292(b) is not merely hypothetical; as demonstrated below, federal courts presiding over consolidated actions have repeatedly used both tools to authorize immediate appellate review. *Cf. Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (observing, in refusing to allow immediate appeals of orders requiring disclosure of attorney-client privileged information, that while other "discretionary review mechanisms do not provide relief in every case, they serve as useful 'safety valve[s]'").

A. MDL Judges Routinely Use Rule 54(b) To Enter Immediately Appealable Judgments in Consolidated Proceedings.

Federal Rule of Civil Procedure 54(b) authorizes district courts to enter partial final judgments for immediate appeal in either of two circumstances: (1) "[w]hen an action presents more than one claim for relief" and the court finally adjudicates one of those claims, and (2) "when multiple parties are involved" and the court finally adjudicates all of the claims by or against at least one party.

To "dispatch[]" a judgment for appeal in either circumstance, *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435 (1956), the district court need only "expressly determine[] that there is no just reason for delay." Fed. R. Civ. P. 54(b). This determination is for "good reason left to the sound judicial discretion of the district court," *Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 10

(1980), because it is "the one most likely to be familiar with the case and with any justifiable reasons for delay," *Mackey*, 351 U.S. at 437. "The timing of such a release" is also "vested by the rule primarily in the discretion of the District Court." *Id.*

Litigants have long used Rule 54(b) to secure immediate appellate review in multidistrict litigation. The massive MDL involving the allegedly defective implantation of orthopedic bone screws is illustrative. There, the JPML consolidated and transferred more than 2,800 individual actions from 60 federal districts to the Eastern District of Pennsylvania for pretrial purposes. In the course of the litigation, the district judge repeatedly entered partial final judgments authorizing immediate appeals to the Third Circuit under Rule 54(b). In one such appeal, for example, the Third Circuit reversed the district judge's preemption- and Rule 12(b) (6)-based dismissal of plaintiffs' claims against one defendant. *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 159 F.3d 817, 819–21 (3d Cir. 1998). This Court afforded the litigants further review on that same Rule 54(b) appeal, granting certiorari and reversing the Third Circuit's preemption holding. *Buckman Co. v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 347 (2001). In another Rule 54(b) appeal from the same MDL proceeding, the Third Circuit reviewed the district judge's dismissal of conspiracy and concert-of-action claims alleged by thousands of plaintiffs. *In re Orthopedic Bone Screw Prods Liab. Litig.*, 193 F.3d 781, 784–788 (3d Cir. 1999).

Rule 54(b) was also employed in an antitrust MDL in the Northern District of Illinois comprising hundreds of separate lawsuits alleging that prescription drug manufacturers and wholesalers conspired to fix prices charged

to retail pharmacies. During the course of that sprawling litigation, the district judge handling the MDL certified, and the Seventh Circuit considered, several Rule 54(b) appeals. In one such appeal, the Seventh Circuit reversed the district judge's grant of partial summary judgment to one of the pharmaceutical-company defendants. *In re Brand Name Prescription Drugs Antitrust Litig.*, 123 F.3d 599, 604–05 (7th Cir. 1999). In another Rule 54(b) appeal, the Seventh Circuit reversed the district judge's grant of partial summary judgment to the wholesaler defendants. *Id.* And in yet another Rule 54(b) appeal, the Seventh Circuit affirmed the district judge's partial summary judgment on certain claims against the wholesaler defendants, even though the liability of other defendants remained "unresolved" in the district court. *In re Brand Name Prescription Drugs Antitrust Litig.*, 288 F.3d 1028, 1030 (7th Cir. 2002).

These are just a couple of illustrative examples. Individual litigants have successfully sought and obtained immediate appellate review under Rule 54(b) in hundreds of MDL proceedings across all federal circuits. *See, e.g.*, *In re Fosamax (Alendronate Sodium) Prods. Liab. Litig. (No. II)*, 751 F.3d 150, 155–56 (3d Cir. 2014) (reviewing partial judgment in Fosamax pharmaceutical MDL); *In re Family Dollar FLSA Litig.*, 637 F.3d 508, 510 (4th Cir. 2011) (reviewing partial summary judgment in Family Dollar FLSA MDL); *Mountain Bird, Inc. v. Goodrich Corp.*, 369 F. App'x 940, 941–42 (10th Cir. Mar. 23, 2010) (reviewing partial summary judgment in Cessna 208 Series MDL); *In re Peanut Crop Ins. Litig.*, 524 F.3d 458, 461 (4th Cir. 2008) (considering partial summary judgment in Peanut Crop Insurance MDL); *In re Gabapentin Patent Litig.*, 503 F.3d 1254, 1258–59 (Fed. Cir. 2007) (considering partial summary judgment in

pharmaceutical patent MDL); *Montalvo v. Spirit Airlines*, 508 F.3d 464, 469–70 (9th Cir. 2007) (reviewing partial dismissal in Airline Deep Vein Thrombosis MDL); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 258 (2d Cir. 2007) (reviewing partial dismissal in South African Apartheid MDL), *aff'd*, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008).[5]

As respondents have explained in detail, petitioners' assertion that Rule 54(b) is completely unavailable in MDL proceedings lacks merit. *See* Resp. Br. 33. The Federal Rules of Civil Procedure generally apply in MDL proceedings, *see* Fed. R. Civ. P. 81, and there is nothing in the language of Rule 54(b) in particular that could be read to exclude multidistrict litigation. Although Rule 54(b)'s "multiple-claims" provision authorizes entry of a final partial judgment "[w]hen *an action* presents more than one claim for relief," the term "action" is sensibly interpreted as referring to the entire consolidated litigation, not to the individual constituent cases consolidated within that litigation. What this Court once said about the term "party" applies to the

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[5] At least four Rule 54(b) appeals were allowed in the MDL concerning the September 11th terrorist attacks. *See In re Terrorist Attacks on Sept. 11, 2001*, 538 F.3d 71, 79 (2d Cir. 2008) (reviewing dismissal of certain claims against seven of the defendants under the Foreign Sovereign Immunities Act), *abrogated by Samantar v. Yousuf*, 560 U.S. 305 (2010); *In re Terrorist Attacks on Sept. 11, 2011*, 714 F.3d 659, 665 (2d Cir. 2013) (reviewing dismissal of certain claims against 37 other defendants for lack of personal jurisdiction); *In re Terrorist Attacks on Sept. 11, 2011*, 714 F.3d 109, 111 (2d Cir. 2013) (reviewing dismissal of claims against two defendants for lack of jurisdiction); *In re Terrorist Attacks on Sept. 11, 2011*, 714 F.3d 118, 122 (2d Cir. 2013) (reviewing dismissal of claims against five other defendants for failure to state a claim upon which relief could be granted).

word "action," as well: it need not be taken to "indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context." *Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002).

Moreover, even if the term "action" were given petitioners' proposed construction, it would not matter here because Rule 54(b)'s separate "multi-party" provision authorizes the entry of partial final judgment "when multiple parties are involved"—without using the term "action." Consequently, under either reading, petitioners could have (and should have) sought a Rule 54(b) judgment to appeal—just as hundreds of other MDL litigants have successfully done. (Notably, petitioners assert in their brief—echoing Rule 54(b)'s standard almost verbatim—that "there is no reason for delay" of their appeal. Pet. Br. 11.)

B. MDL Judges Routinely Use Section 1292(b) To Certify Interlocutory Appeals in Consolidated Proceedings.

In addition to invoking Rule 54(b), MDL litigants may also seek immediate appellate review of adverse district court orders under 28 U.S.C. § 1292(b). "[E]nacted to meet the recognized need for prompt review of certain nonfinal orders," *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474 (1978), Section 1292(b) establishes a "two-tiered arrangement" for certifying an interlocutory appeal, *Swint v. Chambers County Comm'n*, 514 U.S. 35, 47 (1995).

First, a district court must determine that the order "involves a controlling question of law as to which there is a substantial ground for difference of opinion" and that

"an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Second, if a district court certifies an order for immediate appeal under Section 1292(b), the court of appeals may, in its discretion, permit an appeal to be taken. *Id.* Notably, in considering the appeal, the court of appeals is not limited to the "controlling question of law identified by the district court," but may "exercise jurisdiction over any question that is included within the order that contains the controlling question of law." *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 204 (1996).

District judges presiding over MDLs have repeatedly certified, and the appellate courts have routinely accepted, Section 1292(b) appeals. *See, e.g., In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 753 F.3d 521, 526–28 (5th Cir. 2014) (reviewing denial of motion to dismiss, among other certified issues, in drywall MDL); *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845, 848 (7th Cir. 2012) (en banc) (reviewing denial of motion to dismiss in potash MDL); *In re Enter. Rent-A-Car Wage & Hour Emp't Practices Litig.*, 683 F.3d 462, 465–67 (3d Cir. 2012) (considering grant of summary judgment to one defendant in labor and employment MDL); *W.R. Huff Asset Mgmt., Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 103–04 (2d Cir. 2008) (reversing denial of motion to dismiss plaintiff's claims for lack of standing in federal securities MDL); *Novell, Inc. v. Microsoft Corp.*, 505 F.3d 302, 304–05 (4th Cir. 2007) (reviewing denial of motion to dismiss for lack of antitrust standing in antitrust MDL); *In re Auto. Refinishing Paint Antitrust Litig.*, 358 F.3d 288, 290–92 (3d Cir. 2004) (reviewing denial of motion to dismiss in automotive-paint antitrust MDL); *In re Korean Air Lines Disaster of Sept. 1, 1983*,

829 F.2d 1171, 1172 (D.C. Cir. 1987) (R.B. Ginsburg, C.J.) (reviewing denial of plaintiff's motion for summary judgment in airline-disaster MDL), *aff'd*, *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 135 (1989).

In sum, Rule 54(b) and Section 1292(b) substantially mitigate any claimed hardship resulting from a robust, and pragmatic, application of the final-judgment rule in multidistrict litigation. There simply is no compelling reason to adopt petitioners' rule automatically authorizing (and, in fact, requiring) immediate appeals from every dispositive order in every constituent case within an MDL proceeding.

III. Petitioners' Rule Would Abrogate Longstanding Circuit Precedent Without Any Valid Justification.

Given that petitioners' proposed finality rule is neither consistent with the effective management of complex litigation nor necessary in light of other avenues for appellate review, it should come as no surprise that their position has garnered almost no support among the courts of appeals. Although petitioners assert that "the majority of circuits would have permitted [their] appeal" in the particular circumstances of this case, Pet. Br. 36, that narrow characterization of the issue fails to capture the broader question before this Court: whether an order resolving the claims in one (but not all) of a group of consolidated cases is a "final decision[]" within the meaning of 28 U.S.C. § 1291 that may—indeed, must—be appealed immediately. "Just as Rule 42(a) enables district courts to consolidate cases for a variety of reasons, it permits various *degrees* of consolidation. Cases may be consolidated for discovery, for pre-trial proceedings, for

trial, or for all purposes." Jacqueline Gerson, Comment, *The Appealability of Partial Judgments in Consolidated Cases*, 57 U. Chi. L. Rev. 169, 173 (1990). The question before the Court asks what rule should apply to consolidated cases generally, not just to petitioners' own particular appeal.

Petitioners' narrow statement of the issue obscures the consensus that has developed among the courts of appeals that, at least where the cases have been consolidated for all purposes, an order disposing of one constituent action is *not* final and appealable. Although the circuits' formulations of their approaches to the issue have varied, they have been largely consistent on this basic point for more than 25 years: 10 deem such an order non-final and non-appealable in cases that have been fully consolidated "for all purposes,"[6] another reaches the

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[6] Three circuits deem such orders non-final in all consolidated cases regardless of the scope of the consolidation. *Spraytex, Inc. v. DJS&T & Homax Corp.*, 96 F.3d 1377, 1382 (Fed. Cir. 1996); *Trinity Broad. Corp. v. Eller*, 827 F.2d 673, 675 (10th Cir. 1987); *Huene v. United States*, 743 F.2d 703, 705 (9th Cir. 1984). Seven more reach the same result in cases that have been consolidated "for all purposes." *Schippers v. United States*, 715 F.3d 879, 884 (11th Cir. 2013) ("[W]hen . . . cases are consolidated 'for all purposes' each case must be final in order for any of them to be appealed . . . ."); *Evans v. Akers*, 534 F.3d 65, 69 (1st Cir. 2008) ("[D]isposition of one case in a consolidated action is a final and appealable judgment *unless the cases were consolidated 'for all purposes.'*" (emphasis added; quoting *Global Naps, Inc. v. Verizon New England, Inc.*, 396 F.3d 16, 22 (1st Cir. 2005))); *United States ex rel. Hampton v. Columbia/HCA Healthcare Corp.*, 318 F.3d 214, 216 (D.C. Cir. 2003) ("[W]hen a district court consolidates cases . . . 'for all purposes,' an order deciding fewer than all the claims of all the parties cannot be appealed without a Rule 54(b) certification."); *Tri-State Hotels, Inc. v. FDIC*, 79 F.3d 707, 711–712 & n.5 (8th Cir. 1996) (an order disposing of all claims in one of multiple consolidated lawsuits is not final and appealable if the "lawsuits were formally merged, for all purposes");

same result in all but "highly unusual circumstances,"[7] and another, without squarely resolving the issue, has indicated that consolidation "for all purposes" is at least an important factor weighing against finality.[8]

The courts have deemed such orders non-final for good reasons. A court of appeals wants to know that it can "deal with one appeal confident that the same problem will not recur in a later appeal in the same case"—*i.e.*, "to ensure that a single set of factual and legal questions come before the court of appeals but once." *Sandwiches, Inc.*, 822 F.2d at 709–10. Preventing seriatim appeals also preserves the district court's control over the consolidated litigation. "[T]he district court . . . made the original decision to consolidate," and it "is best able to assess the original purpose of the consolidation and whether an interim appeal would frustrate that pur-

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Bergman v. Atlantic City, 860 F.2d 560, 566 (3d Cir. 1988) ("[W]here two actions have been consolidated . . . for all purposes, . . . an order concluding one of the consolidated cases should not be considered final and appealable."); *Sandwiches, Inc. v. Wendy's Int'l, Inc.*, 822 F.2d 707, 709 (7th Cir. 1987) ("If the cases have been consolidated for all purposes, then the judgment does not cover all claims and parties, and no one may appeal unless the district court makes the findings required by Fed. R. Civ. P. 54(b)."); *Ringwald v. Harris*, 675 F.2d 768, 771 (5th Cir. 1982) (an order disposing of all claims in one of multiple consolidated lawsuits is not final and appealable "when the consolidation is clearly unlimited and the actions could originally have been brought as a single suit").

[7] *Hageman v. City Investing Co.*, 851 F.2d 69, 71 (2d Cir. 1988) (establishing a "strong presumption" that such an order is not appealable).

[8] *Eggers v. Clinchfield Coal Co.*, 11 F.3d 35, 39 (4th Cir. 1993). Only the Sixth Circuit has indicated that such an order is final for purposes of appeal. *See Kraft, Inc. v. Local Union 327, Teamsters, Chauffeurs, Helpers, & Taxicab Drivers*, 683 F.2d 131 (6th Cir. 1982).

pose." *Huene*, 743 F.2d at 704–05. In short, the rule follows directly from the policies underlying the final-judgment requirement: "forbidding piecemeal disposition on appeal of what for practical purposes is a single controversy," *Cobbledick*, 309 U.S. at 325; avoiding "the expense and delays of repeated appeals," *McLish v. Rolf*, 141 U.S. 661, 665–66 (1891); and promoting a "healthy respect" for "the prerogatives of district court judges, who play a 'special role' in managing ongoing litigation," *Mohawk Indus.*, 558 U.S. at 106. There is no indication that this sensible rule has caused significant hardship in practice in the overwhelming majority of circuits in which it has been applied.

While ignoring this near-uniform precedent, petitioners urge the Court to adopt a rule that would jettison it completely—again, a rule that would "permit[] appeals from *all* decisions dismissing a complaint on the merits," seemingly without respect to the degree to which cases have been consolidated. Pet. Br. 35–36 (emphasis added). When this Court is asked to abrogate years of circuit precedent on an issue that primarily concerns practice in the district and circuit courts, the party seeking the departure from current practice ought to bear the burden of persuasion.

Yet after proposing their new "categorical" rule, petitioners attempt to justify it by reference to the specifics of their own particular appeal. *See* Pet. Br. 36. As respondents explain, *see* Resp. Br. 13–15, petitioners' case and this appeal are not nearly as distinct from the remainder of the consolidated actions as petitioners contend. For instance, other plaintiffs have argued that their similar federal antitrust claims "materially differ" from petitioners' claims, and that issue remains pending

in the district court. *Id.* But more importantly, petitioners' assertions about the (perceived) unfairness in their own case fall far short of justifying the sea change in the law that they seek.

Moreover, there is no sound basis for applying a different rule of finality to cases that have been consolidated for all purposes than to those that have been consolidated only for pre-trial purposes.[9] The practical considerations that underlie the consensus view in the former category apply equally to the latter. That is so for at least three reasons. First, "consolidated cases" of all types "tend to be based on the same factual circumstances." *Spraytex, Inc.*, 96 F.3d at 1382. Indeed, even cases that are highly interrelated both factually and legally may be consolidated for pretrial purposes only, *see, e.g.*, *Firemen's Ins. Co. v. Keating*, 753 F. Supp. 1137, 1141 (S.D.N.Y. 1990), for any number of reasons within the discretion of the district court, such as to avoid prejudice to a party or prevent jury confusion, *see, e.g.*, *Pariseau v. Andodyne Healthcare Mgmt., Inc.*, No. Civ. A. 3:04-CV-630, 2006 WL 325379 (W.D.N.C. Feb. 9, 2006), or simply because district judges presiding over MDLs lack the statutory authority under 28 U.S.C. § 1407 to order consolidated trials. Accordingly, even in cases consolidated only for pretrial purposes, "appellate review of the total consolidated case serves the purposes of appellate efficiency" and "comports with the policies underlying the finality rule." *Spraytex, Inc.*, 96 F.3d at 1382.

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[9] *See, e.g.*, *Berryman*, 860 F.2d at 566 (holding that "where two actions have been consolidated for discovery and trial or for all purposes, . . . an order concluding one of the consolidated cases should not be considered final and appealable"—but adopting a "case-by-case approach" to the same issue in cases consolidated for pretrial purposes).

Second, distinguishing (for finality purposes) between cases that have been consolidated for trial and those that have been consolidated only for pretrial purposes places dispositive significance on a factor that is unlikely to have any consequence to the underlying litigation. Only about one percent of all federal civil cases actually proceed to trial.[10] Accordingly, the distinction would turn entirely on a hypothetical event—a consolidated trial—that is almost certain never to occur.

Finally, because judges in MDL proceedings lack statutory authority to order consolidation for trial,[11] a rule distinguishing between fully consolidated cases—in which decisions in constituent actions are not final—and partially consolidated cases—in which they would be—would mandate piecemeal appeals in the very context in which they are most likely to be disruptive. *See supra* Part I.

* * *

Ultimately, petitioners' request for what they call a "categorical rule" bottoms on their view that "it is essential that the point at which a judgment is final be crystal clear because appellate rights depend upon it." Pet. Br.

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[10] *See, e.g.*, Marc Galanter and Angela Frozena, *The Continuing Decline of Civil Trials in American Courts*, at 3, Pound Civil Justice Institute (2011), *available at* http://poundinstitute.org/docs/2011%20judges%20forum/2011%20Forum%20Galanter-Frozena%20Paper.pdf (visited Oct. 20, 2014); *see also Delaventura v. Columbia Acorn Trust*, 417 F. Supp. 2d 147, 150 (D. Mass. 2006) ("[M]any cases are transferred [to MDL proceedings] . . . , but few—very few—ever return for trial.").

[11] *See Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998).

35–36 & n.9 (quoting *Huene v. United States*, 743 F.2d 703, 704 (9th Cir. 1984))). But the distinction that petitioners seem to be suggesting—between the clarity of their proposed rule and the hopeless uncertainty of the alternative—is a false one. No one disputes that jurisdictional rules should be clear, straightforward, and easily administrable, for a whole variety of reasons. *See Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010); Resp. Br. 22 n.7. But the need for a *clear* rule does not necessitate—or even favor—*petitioners'* rule, which would effectively overturn years of precedent in twelve circuits and suddenly require immediate appeals of a large class of orders that have heretofore been non-final and unappealable absent certification by the district judge. Respondents' proposed rule is no less clear than petitioners'—only less wooden and formalistic.

Clarity can be achieved simply by reaffirming the consensus position governing cases that have been consolidated for all purposes—no immediate appeal of a decision disposing of a constituent case absent the district judge's certification—and extending it to consolidated cases generally, including MDLs. That clear rule, quite unlike petitioners', has the added virtue of preserving district judges' case-management discretion, which has been the hallmark of the MDL process since its institution nearly a half-century ago.

CONCLUSION

For the reasons set forth above and in respondents' brief, the decision below should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 13-1174

IN THE

Supreme Court of the United States

ELLEN GELBOIM AND LINDA ZACHER, INDIVIDUALLY FOR THEMSELVES AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

CREDIT SUISSE GROUP AG, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF MAYOR AND CITY COUNCIL OF BALTIMORE, CITY OF NEW BRITAIN FIREFIGHTERS' AND POLICE BENEFIT FUND, TEXAS COMPETITIVE ELECTRIC HOLDINGS COMPANY, LLC, YALE UNIVERSITY, THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, COUNTY OF SAN MATEO, THE SAN MATEO COUNTY JOINT POWERS FINANCING AUTHORITY, CITY OF RICHMOND, THE RICHMOND JOINT POWERS FINANCING AUTHORITY, SUCCESSOR AGENCY TO THE RICHMOND COMMUNITY REDEVELOPMENT AGENCY, CITY OF RIVERSIDE, THE RIVERSIDE PUBLIC FINANCING AUTHORITY, COUNTY OF SAN DIEGO, EAST BAY MUNICIPAL UTILITY DISTRICT, SAN DIEGO ASSOCIATION OF GOVERNMENTS, COUNTY OF SONOMA, DAVID E. SUNDSTROM, IN HIS OFFICIAL CAPACITY AS TREASURER FOR THE COUNTY OF SONOMA, AND COUNTY OF SACRAMENTO AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are plaintiffs—including cities, counties, pension funds, educational institutions, and corporations—that have filed actions concerning the manipulation of the London Interbank Offered Rate ("LIBOR"), currently pending in the United States District Court for the Southern District of New York (*In re LIBOR-Based Financial Instruments Antitrust Litig.*, No. 11-MD-2262). *Amici* Mayor and City Council of Baltimore, Yale University, City of New Britain Firefighters' and Police Benefit Fund, and Texas Competitive Electric Holdings Company LLC purchased LIBOR-based instruments from one or more of the banks that served on the panel that set LIBOR. The district court designated their counsel as interim class counsel for a putative class of persons who purchased LIBOR-based instruments "over the counter" from the panel banks (the OTC plaintiffs). Pet. App. 9a. The OTC plaintiffs, like petitioners, have been consolidated for pretrial purposes with the other LIBOR-related class actions (Pet. App. 11a); *amici* thus have a strong interest in the rules governing appeals in cases subject to the consolidation order.

SUMMARY OF ARGUMENT

The Second Circuit refused to allow petitioners to appeal the dismissal of their action, holding that the right of appeal will not attach until the entire LIBOR consolidated multidistrict proceeding is complete. The

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[1] *Amici* provided petitioners and respondents with timely notice of their intent to file this brief. All parties have consented to the filing of this brief. No counsel for a party has authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

judicially-crafted doctrine underlying the Second Circuit's decision not only conflicts with Congress's decision to confer appellate jurisdiction over "*all* final decisions of the district courts," 28 U.S.C. § 1291 (emphasis added); *see* Pet. Br. at 16–29, but it forestalls appellate review—potentially for many years—of an unprecedented ruling by the district court on a critical issue of antitrust law: Whether the banks' conspiracy to fix LIBOR, a key component of price in LIBOR-based instruments, caused purchasers and holders of those instruments an antitrust injury.

The district court answered this question in the negative, rejecting decades of precedent in interpreting Section 4 of the Clayton Act. This decision ended all antitrust claims at the pleadings stage in the LIBOR consolidated proceeding, and resulted in the dismissal of petitioners' case in full. *Amici* respectfully submit that the district court's decision was not only incorrect, but departed radically from this Court's cases interpreting the antitrust injury requirement. While the merits of that decision are not under review, the strength of petitioners' appeal underscores "the danger of denying justice by delay" (*Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950)) caused by the Second Circuit's rejection of the appeal, one of the key policy considerations supporting early appealability identified by this Court.

The district court's decision was wrong for at least three reasons. *First*, the decision conflicts with decades of this Court's precedent holding that a monetary loss suffered by a consumer due to a price-fixing conspiracy—the harm alleged here—is an actionable antitrust injury under the Clayton Act. *Second*, this Court has repeatedly noted that horizontal price-fixing, a *per se* violation of the antitrust laws, entails an "obvious" and "inherent" risk of anticompetitive impact; nevertheless, the district court improperly concluded that defendants' conduct—pled as

price-fixing—was "not anticompetitive," a holding that turns the *per se* rule on its head. *Third*, the district court rested its decision on its own factual assumptions about the LIBOR rate-setting process—assumptions that were not just contrary to petitioners' allegations but factually incorrect. This was plainly improper at the pleadings stage, before any discovery has taken place.

This case starkly presents the danger of denying justice by delay: about two and a half years have already passed since petitioners filed their original complaint (*see* Jt. App. at 5), a year and a half since the district court dismissed petitioners' amended complaint (*see* Jt. App. at 11–19), and there is no end in sight to the remaining LIBOR proceedings: just last month, the district court lifted the stay on multiple LIBOR individual and putative class actions and requested submissions from the parties on additional motions to dismiss. *See* Jt. App. 297–361. Preventing petitioners from appealing the district court's order leaves them to sit on the sidelines while the remaining LIBOR litigation runs its course, and will require the parties—after reversal—to redo fact discovery and expert analysis to take account of claims that were improperly dismissed. That outcome is inequitable, unjust, and wasteful. For these reasons, *amici* respectfully submit that the Second Circuit's refusal to hear petitioners' appeal should be reversed.

ARGUMENT

I. Decades of Precedent Recognize Consumer Losses From Price-Fixing Constitute Antitrust Injury.

LIBOR is the world's most important benchmark for short-term interest rates. It is also a key component of

price in trillions of dollars of financial instruments, including the floating-interest rate bonds held by petitioners, and the interest-rate swap transactions purchased by many of the *amici*. Respondents are banks who participate in the LIBOR rate-setting process and who, petitioners alleged, conspired to manipulate that benchmark by suppressing LIBOR during the period August 2007 to May 2010. Because the payments received by petitioners on their bonds, and by *amici* on their interest rate swaps, were based on LIBOR, those payments were reduced as well.[2] Pet. App. 29a. For this reason, plaintiffs received less than they were entitled to as a direct result of the banks' conspiracy. *Id.*

It is well-established that consumer losses caused by the fixing of a product's price, such as the losses alleged in the complaints below, constitute an antitrust injury under Section 4 of the Clayton Act. *See, e.g., Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 396 (1906) (holding that purchasers could recover treble damages for collusive overcharges caused by price-fixing cartel); *In re DDAVP Direct Purchaser Antitrust Litig.*, 585 F.3d 677, 688 (2d Cir. 2009) ("In this case, the plaintiffs are purchasers

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[2] LIBOR was created to serve as a benchmark for short term interest rates that could be used as a basis for re-setting rates payable on floating rate debt. Although the language has since been removed from its website, the BBA itself described LIBOR as a "unique snapshot of competitive funding costs." *See* BBA website material reproduced at http://www.swap-rates.com/BBALiborrates.html. The district court recognized that "it is precisely because LIBOR was thought to accurately represent prevailing interest rates in that market that it was so widely utilized as a benchmark in financial instruments." Pet. App. 53a.

of the defendants' product who allege being forced to pay supra-competitive prices as a result of the defendants' anticompetitive conduct. Such an injury plainly is 'of the type the antitrust laws were intended to prevent.'" (citing *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)); *Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 988 (9th Cir. 2000) ("When horizontal price fixing causes buyers to pay more, or sellers to receive less, than the prices that would prevail in a market free of the unlawful trade restraint, antitrust injury occurs."); 2A PHILIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 391b (3d ed. 2007) (injuries to buyers or sellers from horizontal price fixing present "the easy cases" of antitrust injury).

The district court agreed that the plaintiffs' allegations "might suggest that defendants fixed prices and thereby harmed plaintiffs," Pet. App. 43a, but it nevertheless concluded that the harm plaintiffs suffered did not result from any anticompetitive aspect of the banks' conduct. *Id.* But this gets the law backward. Injuries resulting from the fixing of a product's price are *the most widely recognized* type of antitrust injury: in fact, *no reported case in history* has failed to find an antitrust injury in this situation. The district court's decision was a radical departure from over a century of precedent recognizing that purchasers of price-fixed products have sustained antitrust injury.[3]

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[3] Where a consumer suffers a direct loss resulting from a price-fixing conspiracy, plainly the plaintiffs' injury is rooted in a "competition-reducing aspect or effect of the defendant's behavior." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 344 (1990). In conducting a further inquiry into whether that price-fixing occurred in the context of a "cooperative endeavor" as opposed to a "competitive" process, Pet. App. 44a, the district court decision engrafted "artificial limitations on the §4 remedy" that have *never* been previously applied, precisely what this Court has counseled against (*see Blue Shield of Va. v.*

II. The Alleged Conduct Entailed "An Obvious Risk of Anticompetitive Impact."

There is no question that defendants' conspiracy to fix LIBOR, a key component of price, constitutes a *per se* restraint of trade. *See Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 645-47 (1980) (holding that credit is one component of the overall price paid for a product, that an

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McCready, 457 U.S. 465, 472 (1982) (noting that §4 has "little in the way of restrictive language," reflecting "Congress' expansive remedial purpose," and noting "The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated" (quotations omitted))) and contrary to this Court's admonition that "the machinery employed by a combination for price-fixing is immaterial." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940).

Further, even if the submission of LIBOR rates were somehow cooperative, this Court has long held that cooperative association activities can give rise to actionable violations of Section 1 of the Sherman Act in circumstances similar to these. *See, e.g. MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 233 (1994)("The Court itself has policed trade associations and rate bureaus under the antitrust laws precisely because the sharing of pricing information can facilitate price fixing"); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 506-509 (1988) ("[P]rivate standard-setting by associations comprising firms with horizontal and vertical business relations is permitted at all under the antitrust laws only on the understanding that it will be conducted in a nonpartisan manner offering procompetitive benefits. . . . [T]he hope of procompetitive benefits depends upon the existence of safeguards sufficient to prevent the standard-setting process from being biased by members with economic interests in restraining competition"); *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921) (affirming permanent injunction against American Hardwood Manufacturers' Association "Open Competition Plan" because it was used by trade association to control output and price).

agreement to eliminate credit was a form of price fixing, and that "an agreement to fix prices is unlawful *per se*"). The arrangements are *per se* illegal precisely because fixing a component of price "entails an obvious risk of anticompetitive impact." *Catalano*, 446 U.S. at 649; *see also Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984) ("Certain agreements, such as horizontal price fixing . . . are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused."); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) ("'Agreements for price maintenance of articles moving in interstate commerce are, without more, unreasonable restraints within the meaning of the Sherman Act because they eliminate competition . . . .'" (quoting *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927))).

Given over a century's worth of this Court's precedents attesting to the "obvious" and "inherent" risk of anticompetitive impact in this context, petitioners surely pleaded at least a *plausible* antitrust injury against respondents. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007) (plausibility turns on whether there is "enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)" (footnote omitted) (citations omitted)); *cf. Darush v. Revision LP*, No. 12-10296, 2013 WL 8182502, at *5 (C.D. Cal. July 16, 2013) ("[T]he case will be quite rare in which a *per se* violation ... does not cause competitive injury." (quotation and citation omitted)).

Nevertheless, the district court held the defendants' conduct was not anticompetitive as a matter of law. *See* Pet. App. 43a ("Defendants' Alleged Conduct Was Not Anticompetitive."). But this creates the paradoxical situation that conduct declared not to be anticompetitive as a matter of law is nevertheless a *per se* violation of the

Sherman Act and grounds for criminal prosecution. And in conflict with the district court's decision, at least one defendant—after the motion to dismiss briefing was complete but before the district court issued its decision—agreed to a deferred prosecution agreement with the Department of Justice based on charges of *criminal* price-fixing involving Yen LIBOR.[4]

The district court's decision undermines the *per se* rule by foreclosing private plaintiffs from even commencing discovery despite the existence of an antitrust violation that is *presumptively* anticompetitive and the basis for criminal liability.

As the Third Circuit observed:

> [R]equiring a plaintiff to demonstrate that an injury stemming from a per se violation of the antitrust laws caused an actual, adverse effect on a

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[4] One of the defendants, Royal Bank of Scotland PLC, was charged with "one count of price-fixing" in violation of Section 1 of the Sherman Act for its participation in the conspiracy to manipulate the Yen LIBOR benchmark. Deferred Prosecution Agreement at ¶ 1, *United States v. The Royal Bank of Scotland PLC*, No. 3:13-cr-00074-MPS (D. Conn. 2013), *available at* http://www.justice.gov/iso/opa/resources/28201326133127414481.pdf. In the deferred prosecution agreement, RBS admitted that LIBOR is a component of price and that conspiring to manipulate LIBOR is a restraint of trade. *Id.* at ¶81-82. In particular, RBS acknowledged its legal responsibility for the acts charged in the Information, *id.* at ¶2, which alleged that RBS "engaged in a combination and conspiracy in unreasonable restraint of interstate and foreign commerce . . . the substantial terms of which were to fix the price of Yen LIBOR-based derivative products by fixing Yen LIBOR, a key component of the price thereof, on certain occasions." *See* Information at ¶ 2, *United States v. The Royal Bank of Scotland PLC*, No. 3:13-cr-00074-MPS (D. Conn. 2013), *available at* http://www.justice.gov/atr/cases/f296500/296519.pdf.

> relevant market in order to satisfy the antitrust injury requirement comes dangerously close to transforming a per se violation into a case to be judged under the rule of reason. The per se standard is reserved for certain categories of conduct which experience has shown to be "manifestly anticompetitive." *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 39 (1977). That standard, which is based on considerations of "business certainty and litigation efficiency," *Arizona v. Maricopa County Med. Society*, 457 U.S. 332, 344 (1982), allows a court to presume that certain limited classes of conduct have an anticompetitive effect without engaging in the type of involved, market-specific analysis ordinarily necessary to reach such a conclusion. *See Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988) ("Certain categories of agreements, however, have been held to be per se illegal, dispensing with the need for case-by-case evaluation."). *Were we to accept the defendants' construction of the antitrust injury requirement, we would, in substance, be removing the presumption of anticompetitive effect implicit in the per se standard under the guise of the antitrust injury requirement.*

Pace Elecs., Inc. v. Canon Computer Sys., Inc., 213 F.3d 118, 123 (3d Cir. 2000) (emphasis added and footnote omitted). The district court, by holding that defendants conduct "[w]as [n]ot [a]nticompetitive" (Pet. App. 43a), effectively abolished the *per se* presumption.[5]

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[5] In neither *ARCO* nor *Brunswick*, the two cases relied on by the district court, did the court hold that the defendants' conduct was *not* anticompetitive as a matter of law. Rather, in each case the court determined that even if the defendants' conduct were anticompetitive, the particular plaintiffs at issue—competitors, not consumers like the

III. The District Court Improperly Rested Its Conclusion on Factual Assumptions that Discovery Would Have Revealed as False.

The district court's assumptions concerning the LIBOR rate-setting process were also incorrect. Fundamentally, the district court held that because the LIBOR rate-setting process was "never intended to be competitive," but rather was a "cooperative endeavor," any monetary losses caused by defendants' collusion was not actionable. Pet. App. 44a. The district court reached this factual conclusion on its own: it did not hold an evidentiary hearing, listen to the testimony of fact or expert witnesses, or otherwise conduct any fact-finding concerning the LIBOR rate-setting process.[6] Not only is

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petitioners—did not suffer a cognizable injury as a result. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (holding that dealers and consumers, not competitors such as the plaintiff, were parties who potentially would suffer antitrust injury); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (recognizing that defendant's conduct may have lessened competition in one way—by bringing a "'deep pocket' parent into a market of 'pygmies,'" but noting that the plaintiff's damages stemmed from a different, competition-*increasing* aspect of the defendant's conduct). While framed as a decision on antitrust injury under the Clayton Act, the district court appeared to disagree that an antitrust violation under the Sherman Act had been committed to begin with, which conflicts with countless precedents concerning the *per se* rule.

[6] The district court's decision cited to only two cases in which a claim was dismissed for lack of antitrust injury. Notably, neither of those cases was a horizontal price-fixing case, and neither resolved the antitrust injury issue at the pleadings stage, as opposed to after full development of the factual record through discovery. *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

this improper on a motion to dismiss, but discovery would have shown that the published rules concerning the LIBOR rate-setting process precluded the banks from "cooperating" as to the rates they submitted, and instead required each bank to independently exercise its good faith judgment each day about the interest rate that it would be required to pay. *See* June 26, 2012 Non-Prosecution Agreement between United States Department of Justice and Barclays Bank PLC, Appendix A (Statement of Facts) ¶¶ 2, 6, *available at* http://www.justice.gov/iso/opa/resources/93120127101 73426365941.pdf. Further, as several of the defendants have already *admitted* in their settlements with the Department of Justice, the banks were expressly required to submit rates "without reference to rates contributed by other Contributor Panel banks." *See, e.g., id.* ¶ 6. When, after the district court's decision, the OTC plaintiffs and others attempted to amend their complaints to explain in even greater detail how defendants' conduct reduced competition (including by eliminating the competitive forces that should have driven the panel banks to compete to submit their lowest accurate LIBOR rates), the district court dismissed the new allegations in less than a page, simply as "new ways of packaging previously known facts." Pet. App. 199a.

The district court also ignored the allegations in petitioners' and *amici*'s complaints below that the defendant banks who fixed LIBOR also used LIBOR as part of the price in trillions of dollars of financial instruments sold to customers. The district court never explained how the defendants' failure to compete as to that component of price did not reduce competition, and how plaintiffs' losses, which stemmed directly from that failure to compete, was not a "loss [that] stems from a competition-reducing aspect *or effect* of the defendant's behavior." *ARCO*, 495 U.S. at 344 (emphasis added).

Permitting the banks to avoid liability simply because they fixed prices one way (using an index that has been fixed as a component of price) as opposed to another (fixing the final price directly), undermines this Court's directive that "the machinery employed by a combination for price-fixing is immaterial." *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). It also leaves consumers injured by collusion as to numerous similar benchmarks used to set prices for commodities—ranging from oil to gold to silver—without any remedy under the antitrust laws. This is precisely the type of "artificial limitation[] on the §4 remedy" that this Court has rejected. *Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982).

Finally, the district court placed significance in its belief that, even if defendants had colluded to fix LIBOR, petitioners' harm *could* have been caused through non-collusive means, which the district court believed counseled against a finding of antitrust injury. Pet. App. 47a-52a. *Id.* at 49a ("[T]he harm alleged here could have resulted from normal competitive conduct. Specifically, the injury plaintiffs suffered from defendants' alleged conspiracy to suppress LIBOR is the same as the injury they would have suffered had each defendant decided independently to misrepresent its borrowing costs to the BBA."). However, the harm from *any* antitrust violation could hypothetically occur in the absence of that violation; if that were the test, no price-fixing case would give rise to an antitrust injury, because in each case the same harm "could have" resulted from independent parallel adjustments in prices, the explanation defendants often advance for lockstep economic decisions. The law prohibits horizontal price-fixing even if the defendants "might have" charged the same prices absent collusion, as several courts have observed. *See, e.g., In re Cardizem CD Antitrust Litig.*, 332 F.3d 896, 915 n.19 (6th Cir. 2003) ("[T]he defendants' position, if adopted, risks undermining

a basic premise of antitrust law that, as the district court observed, in many instances, an otherwise legal action—*e.g.*, setting a price—becomes illegal if it is pursuant to an agreement with a competitor. Under the defendants' view, such an action would never cause antitrust injury because a defendant *could* have unilaterally and legally set the same price."); *Virginia Vermiculite, Ltd. v. W.R. Grace & Co.-Connecticut*, 156 F.3d 535, 540 (4th Cir. 1998) (recognizing that defendants are "foreclosed from challenging causation [on a Sherman Act Section 1 claim] simply on the basis that it could have achieved the same result through lawful means").[7]

The district court's approach is not only wrong, but if perpetuated, would immunize a broad array of antitrust conduct from the purview of the Clayton Act's private remedies.

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[7] *See also In re Cardizem CD Antitrust Litig.*, 105 F. Supp. 2d 618, 648, n. 16 (E.D. Mich. 2000) ("To accept Defendants' argument, the Court must also accept the argument that there can never be an antitrust violation if the antitrust defendant can posit an argument that it could have lawfully done the same thing it is accused of doing collusively. . . . There are many things a defendant can do unilaterally without offending the antitrust laws that it cannot do collusively. For example, consider two gas stations that have control over a large geographic market and independently price their gas in such a way that they are within a penny or so of each other. That is not an antitrust violation. However, if the two gas stations, which have a monopoly over gas in the geographic market area, *agree* to fix the price of gasoline, then there is an antitrust violation. The violation would meet the *Brunswick* criteria for antitrust injury because the claimed injury is of the type the antitrust laws were meant to discourage; agreements to fix prices. Also, the plaintiff's injury (having to pay higher, deliberately set prices) is causally related to the defendant's anticompetitive acts. The same analysis applies here.").

The district court dismissed petitioners' action based on a clearly incorrect view of antitrust injury under the Clayton Act. If petitioners' action were not consolidated for pretrial purposes with other LIBOR-related actions, petitioners would right now be seeking correction of this ruling in the Second Circuit. However, under the Second Circuit's rule, petitioners will be held hostage to the proceedings of every other action subject to the consolidation order, so that they cannot pursue an appeal until everyone's case is finished.[8] Then, once the antitrust injury decision is reversed, petitioners will join all parties, including *amici* and defendants, in redoing fact and expert discovery to take account of antitrust claims that never should have been dismissed in the first place. This process will take many years, "denying justice by delay" (*Dickinson*, 338 U.S. at 511) and running directly contrary to the order that courts should construe the federal rules "to secure the just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

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[8] There are currently more than 40 separate cases in the multidistrict litigation, asserting more than a dozen distinct causes of action. Jt. App. 309-11; 304-307; 322-23; 335; 337; 341; 350-54. In all but four of these cases, defendants only recently filed 13 pre-motion letters seeking leave to move to dismiss the complaints. Jt. App. 298, 300-361, 356.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that this Court reverse the judgment of the Second Circuit.

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September 5, 2014

AMICUS CURIAE BRIEF

No. 13-1174

IN THE

Supreme Court of the United States

ELLEN GELBOIM, ET AL.,

Petitioners,

v.

BANK OF AMERICA CORPORATION, ET AL.,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF RETIRED UNITED STATES DISTRICT JUDGES IN SUPPORT OF RESPONDENTS

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INTEREST OF THE AMICI[1]

Amici are former United States District Judges with extensive experience handling complex, consolidated litigation, both as presiding judges and as members of the Judicial Panel on Multidistrict Litigation. They submit this brief to elaborate on the perspective of the District Judge in those complicated circumstances, and to shed light on why the District Judge is best positioned to assess when one or more constituent claims may be appropriate for separate appeal while the rest of the consolidated litigation remains pending.

The Honorable **Louis Bechtle** was a United States District Judge for the Eastern District of Pennsylvania from 1972 to 2001, and Chief Judge from 1990 to 1993. From 1994 to 2001, by appointment of the Chief Justice, he served as a member of the Judicial Panel on Multidistrict Litigation. Judge Bechtle also presided over numerous MDLs as a District Judge, including *In re Diet Drugs Products Liability Litigation*, MDL No. 1203, *see, e.g.*, *Collins v. Am. Home Prods. Corp. (In re Diet Drugs Prods. Liab. Litig.)*, No. 98-20299, 1998 U.S. Dist. LEXIS 18109, at *2 (E.D. Pa. Nov. 16, 1998) ("'fen-phen' diet drug litigation"); *In re Orthopedic Bone Screw Products Liability Litigation*, MDL No. 1014, *e.g.*, 1997 U.S. Dist. LEXIS 17250 (E.D. Pa. Aug. 22, 1997) ("2,300 civil actions involving over 5,000 plaintiffs"); and *In re Bexar County Health Facilities Development Corporation*,

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[1] The parties' consents to the filing of amicus curiae briefs are on file with the Clerk. No counsel for any party authored any portion of this brief, and no one other than the *amici curiae* and their counsel provided any monetary contribution to its preparation or submission.

MDL No. 768, *e.g.*, 1992 U.S. Dist. LEXIS 15967, at *1 (E.D. Pa. Sept. 25, 1992) (consolidated securities fraud actions). In addition, Judge Bechtle was appointed by the Chief Justice to facilitate settlement in *In re Air Crash Disaster*, MDL No. 742, *see Polec v. Northwest Airlines (In re Air Crash Disaster)*, 86 F.3d 498, 526 (6th Cir. 1996), and *In re Fire Disaster at Dupont Plaza Hotel*, MDL No. 721. *See In re Nineteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litigation*, 982 F.2d 603, 605 (1st Cir. 1992).

The Honorable **W. Royal Furgeson, Jr.** was a United States District Judge for the Western District of Texas from 1994 through 2013. From 2008 to 2013, by appointment of the Chief Justice, he served as a member of the Judicial Panel on Multidistrict Litigation. Judge Furgeson has served as President of the Federal Judges Association, as Chairman of the Judicial Resources Committee of the Judicial Conference of the United States, and as a member of the Judicial Branch Committee of the Judicial Conference of the United States. He is currently Dean of the University of North Texas at Dallas College of Law.

The Honorable **Barbara S. Jones** was a United States District Judge for the Southern District of New York from 1996 through 2013. From 2010 to 2012, by appointment of the Chief Justice, she served as a member of the Judicial Panel on Multidistrict Litigation. As a District Judge, Judge Jones presided over numerous Multidistrict Litigations and other high-profile, complex consolidated cases. *See, e.g.*, *In re Omeprazole Patent Litigation*, MDL No. 1291, 1999 U.S. Dist. LEXIS 12589 (J.P.M.L. Aug. 12, 1999) (centralizing actions "concerning the validity of

. . . various patents relating to [the pharmaceutical] omeprazole"); *In re Satyam Computer Servs., Ltd. Sec. Litig.*, MDL No. 2027, 609 F. Supp. 2d 1375 (J.P.M.L. 2009) (centralizing securities actions "aris[ing] from a purported massive financial scandal"); *Goldstein v. Puda Coal, Inc.*, 827 F. Supp. 2d 348 (S.D.N.Y. 2011) (consolidating eleven securities actions); *In re Salomon Analyst Litig.*, No. 02-3687 *et al.*, 2003 U.S. Dist. LEXIS 905, at *1-2 (S.D.N.Y. Jan. 24, 2003) (consolidating "approximately eighty actions" asserting securities-fraud claims "relating to analyst research reports" into "nine lead actions").

The Honorable **A. Howard Matz** was a United States District Judge for the Central District of California from 1997 to 2013. He presided over MDL proceedings in *In re Conseco Life Insurance Co. Cost of Insurance Litigation*, MDL No. 1610; *see, e.g.*, 2005 U.S. Dist. LEXIS 45538 (C.D. Cal. May 31, 2005), and numerous other complex consolidated cases, including *Townsley v. Hydro International LLC*, No. 10-2212, 2010 U.S. Dist. LEXIS 90308 (C.D. Cal. Aug. 2, 2010); *Vizio, Inc. v. Funai Elec. Co.*, No. 09-0174, 2010 U.S. Dist. LEXIS 30850, at *1 (C.D. Cal. Feb. 3, 2010) ("coordinated patent litigation"); and *Klein v. Avis Rent a Car System Inc.*, No. 08-6059 *et al.*, 2009 U.S. Dist. LEXIS 34522 (C.D. Cal. Mar. 23, 2009) (consolidating eight putative class actions).

The Honorable **Michael B. Mukasey** was a United States District Judge for the Southern District of New York from 1988 through 2006, and Chief Judge from 2000 to 2006. After his retirement from the bench, from 2007 to 2009, Judge Mukasey served as the 81st Attorney General of the United States. As a District Judge, Judge Mukasey presided

over MDL proceedings in *In re Assicurazioni Generali S.P.A. Holocaust Era Insurance Litigation*, MDL No. 1374, 340 F. Supp. 2d 494, 496 (S.D.N.Y. 2004) ("twenty separate actions" alleging that defendant "failed to pay benefits following the death of the policy holders or damage to their property during the German campaign of genocide"); *In re Philip Services Corp. Securities Litigation*, MDL No. 1230; *see* 1998 U.S. Dist. LEXIS 8232 (J.P.M.L. June 2, 1998) (transferring thirteen securities actions); and *In re RJR Nabisco Securities Litigation*, MDL No. 818, No. 88-7905, 1992 U.S. Dist. LEXIS 12702 (S.D.N.Y. Aug. 24, 1992) (consolidated securities class actions). His experience in the MDL sphere also includes *In re United States Lines, Inc.*, No. 97-6727, 1998 U.S. Dist. LEXIS 10135, at *1-2 (S.D.N.Y. July 9, 1998) (bankruptcy appeal of claims brought by "15,000 merchant seamen" related to "multidistrict asbestos litigation" pending in the Eastern District of Pennsylvania; ordering claims transferred to MDL Court for pretrial management). Judge Mukasey has also presided over complex consolidated litigation outside the MDL context, *e.g.*, *In re Merrill Lynch Limited P'ships Litig.*, 7 F. Supp. 2d 256 (S.D.N.Y. 1997) (consolidated RICO claims), and entered the transfer order consolidating "more than 1,000 class actions . . . for pretrial purposes" in *In re Initial Public Offering Securities Litigation*, 174 F. Supp. 2d 70, 72 (S.D.N.Y. 2001).

The Honorable **Stephen M. Orlofsky** was a United States District Judge for the District of New Jersey from 1996 to 2003 and a Magistrate Judge of that Court from 1976 to 1980. Following his resignation from the bench, Judge Orlofsky served as a Special Master, issuing over a dozen substantive

opinions on consolidated multidistrict antitrust- and patent-related claims, in *In re K-Dur Antitrust Litigation*, MDL No. 1419; *see, e.g.*, No. 01-1652, 2007 U.S. Dist. LEXIS 97509 (D.N.J. Sept. 25, 2007). As a District Judge, Judge Orlofsky handled such complex consolidated cases as *In re Bayside Prison Litigation*, 190 F. Supp. 2d 755, 756 (D.N.J. 2002) (consolidated cases with "hundreds of constantly evolving Plaintiffs"), and *In re Consolidated Parlodel Litigation*, 22 F. Supp. 2d 320, 321 (D.N.J. 1998) ("fourteen products liability actions" consolidated for pretrial purposes).

The Honorable **James Robertson** was a United States District Judge for the District of Columbia from 1994 to 2010. He presided over *In re Department of Veterans Affairs (VA) Data Theft Litigation*, MDL No. 1796, *see* 653 F. Supp. 2d 58 (D.D.C. 2009), and other complex consolidated cases such as *Assiniboine & Sioux Tribes of the Fort Peck Indian Reservation v. Norton*, 527 F. Supp. 2d 130, 133-34 (D.D.C. 2007) ("limited consolidation" of "37 tribal lawsuits"); *Ibrahim v. Titan Corp.*, 556 F. Supp. 2d 1 (D.D.C. 2007); and *Twin Cities Bakery Workers Health & Welfare Fund v. Biovail Corp.*, No. 01-2197 *et al.*, 2005 U.S. Dist. LEXIS 5570 (D.D.C. Mar. 31, 2005).

SUMMARY OF ARGUMENT

This case requires a judgment about when one case in a set of consolidated cases, especially an MDL, is sufficiently separate to justify an immediate appeal without waiting for final judgment in any other cases from the MDL. The *amici* submit this brief to share the experience that they and their

fellow District Judges have in making exactly that judgment.

Proximity, personal contact, and regular attention make District Judges more familiar with a consolidated litigation than anyone else. Their familiarity places them in the best position to judge how the pieces fit together—including which pieces may constructively be dispatched to the Court of Appeals for early, interlocutory resolution, and which should await further developments in the District Court. That is why this Court has entrusted District Judges with the role of "dispatcher" under Rule 54(b), "determin[ing] the 'appropriate time' when each final decision in a multiple claims action is ready for appeal." *Curtiss-Wright Corp. v. GE*, 446 U.S. 1, 8 (1980); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435 (1956). The analysis is no different in an action that consolidates multiple cases.

If anything, in complex litigation like this, the role of the dispatcher is even *more* important. MDLs are incredibly complex and challenging to manage. Giving each individual litigant sole control of appellate timing risks creating delays and dilemmas for the District Judge and the other litigants. Progress with discovery, summary judgment, and trial may be slowed while everyone waits for the Court of Appeals to resolve an unrepresentative appeal that should never have been made the test case. Indeed, the premature trip to the Court of Appeals may pretermit the District Court from reaching a thorough and comprehensive resolution of a common legal issue in a way that takes account of all member cases in the MDL.

Applying Rule 54(b) in this context promotes sound judicial administration. Holding that

individual litigants in a consolidated case can *always* appeal, or can *never* appeal, would necessarily overlook the case-specific considerations that may make some interlocutory appeals worthwhile and others counterproductive. But with District Judges performing the job of dispatcher under Rule 54(b), there is an easily understood rule (a certificate is required for an appeal) that allows an on-the-ground decisionmaker to take into account exactly those case-specific considerations.

In short, District Judges already make sound judgments about when a constituent part of an MDL is ready to go up on appeal. In deciding this case, this Court's interpretation of the jurisdictional statutes should be fully informed by District Judges' gatekeeping experience.

ARGUMENT

The Court granted *certiorari* to decide when a litigant may appeal the dismissal of one case among a set of cases consolidated in an MDL, while the rest of the cases remain pending in the District Court. Answering that question requires this Court to decide *who shall decide* that an individual case is fit for appeal. Does the District Judge make that judgment, by granting a certification "expressly determin[ing] that there is no just reason for delay," pursuant to FED. R. CIV. P. 54(b)? Does the Court of Appeals make the judgment, by looking at the paper record of proceedings in the District Court and assessing whether the proceedings were more consolidated than separate? Or does each litigant decide the matter for itself, under a *per se* rule that every case that began with a separate complaint may proceed as a separate appeal?

As former federal District Judges who have presided over MDLs (and, in the case of Judges Bechtle, Furgeson, and Jones, served on the Judicial Panel on Multidistrict Litigation), the *amici curiae* do not seek to opine on the proper legal interpretation of the jurisdictional statute, the MDL statute, or Rule 54(b). Rather, the *amici curiae* seek to demonstrate that whether an immediate appeal in one but not all consolidated cases is "desirable" (Pet. Br. 29) cannot be determined by a blanket rule, but instead will depend on the circumstances of each case. Weighing those individual circumstances should be done by the presiding District Judge, who is in the best position to evaluate whether an immediate appeal will help or hinder the coordination of the MDL.

I. The District Court is in the best position to assess the desirability of a single appeal from a consolidated case.

Through its rulemaking power, this Court has made the District Court the "dispatcher"—the body with authority to decide when a particular claim is ready to be sent on to the Court of Appeals while the remainder of the litigation remains behind in the District Court. *Curtiss-Wright Corp. v. GE*, 446 U.S. 1, 8 (1980); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 435 (1956). As this Court recognized, the District Court is uniquely well-situated to make the discretionary determination whether a judgment disposing of just some of the claims warrants an appeal while other claims remain pending. The District Court performs the same role, just as readily, whether the claims are all presented in a single complaint or in multiple complaints consolidated for decision. District Courts carefully

and thoroughly carry out their responsibility under Rule 54(b), allowing appeals to proceed when circumstances warrant, but protecting the judicial system by disallowing immediate appeals when they would squander scarce judicial resources or hinder the resolution of claims still pending before them.

A. This Court has repeatedly emphasized the District Court's superior vantage point.

In its cases considering Rule 54(b), this Court has repeatedly returned to the District Judge's essential role under that Rule: promoting "sound judicial administration" by making the discretionary, case-sensitive judgment about whether a claim is ready for appeal. *Sears*, 351 U.S. at 437. Although the Rule embodies a "flexibl[e]" approach to appeals of fewer than all claims, the authority to use that flexibility rests with the District Judge, not the litigants. "[T]he District Court is used as a 'dispatcher,'" *id.* at 435: it "determine[s] the 'appropriate time' when each final decision in a multiple claims action is ready for appeal." *Curtiss-Wright*, 446 U.S. at 8. If one or more claims are ready for appellate review, the District Court then exercises its "sound judicial discretion" to "release [those claims] for appeal." *Id.*; *Sears*, 351 U.S. at 437. Because of that degree of "judicial supervision," Rule 54(b) "preserves the historic federal policy against piecemeal appeals." *Sears*, 351 U.S. at 438.

That discretionary judgment rests squarely with the District Judge, because the judgment rests on an understanding of how the pieces of the litigation fit together. The trial judge "is 'the one most likely to be familiar with the case,'" and that familiarity allows him or her to consider "all the facets of a case" before

deciding whether one or more claims are ready to be dispatched to the Court of Appeals. *Curtiss-Wright*, 446 U.S. at 10, 12 (quoting *Sears*, 351 U.S. at 437).

That is why, unlike some other forms of permissive appellate review, Rule 54(b) does not give the Court of Appeals power to decline appeals. *Compare* FED. R. CIV. P. 54(b) (decision made by District Court only), *with* 28 U.S.C. § 1292(b) (decision made by District Court *and* Court of Appeals), *and* FED. R. CIV. P. 23(f) (decision made by Court of Appeals only). Rather, if the basic requisites of Rule 54(b) are met—a final judgment on one or more individual claims, *see Curtiss-Wright*, 446 U.S. at 7—then the District Court's judgment that there is no just reason for delaying appeal is reviewed highly deferentially. *Id.* at 10 ("The reviewing court should disturb the trial court's assessment of the equities only if it can say that the judge's conclusion was clearly unreasonable.").

Although this Court has deliberately refrained from imposing "narrow guidelines for the district courts to follow," *Curtiss-Wright*, 446 U.S. at 11, some considerations are now well-established as part of the analysis. Thus, for instance, District Courts are entirely justified in considering whether the "appellate court would have to decide the same issues more than once," in separate appeals from different claims resolved at different times. *Curtiss-Wright*, 446 U.S. at 8. To be sure, even when there *is* such a possibility of duplicative appeals, "a sufficiently important reason" can still justify an immediate appeal—for example, if "an appellate resolution of the certified claims would facilitate a settlement of the remainder of the claims." *Id.* at 8 n.2. Those are matters to which the District Court is

uniquely attuned. Conversely, when "[t]he basis of liability" for the claims to be appealed is "clearly independent" of the claims still before the District Court, *Sears*, 351 U.S. at 437 & n.9, certification is within the District Court's broad discretion.

The District Court's "intimate knowledge" of the case, *Curtiss-Wright*, 446 U.S. at 12, and the case-specific factors weighing for or against appeal take on heightened importance in the context of complex consolidated litigation. Although neither *Sears* nor *Curtiss-Wright* involved consolidated cases, their reasoning is equally compelling in this context and has been invoked by multiple Courts of Appeals in ruling that a District Court judgment "dispos[ing] of only one of two consolidated cases . . . is not appealable under 28 U.S.C. § 1291 absent a Rule 54(b) certification." *Huene v. United States*, 743 F.2d 703, 703 (9th Cir. 1984). *Huene* stated that such a rule "leave[s] the discretion with the court which is best able to evaluate the [e]ffect of an interim appeal on the parties and on the expeditious resolution of the entire action" and "best able to assess the original purpose of the consolidation and whether an interim appeal would frustrate that purpose." *Id.* at 705. The Second, Tenth, and Federal Circuits have adopted similar rules, with the same rationale.[2]

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[2] *See Trinity Broadcasting Corp. v. Eller*, 827 F.2d 673, 675 (10th Cir. 1987) (declining to "make[] the appellate court the arbiter of the nature and purpose of consolidation, rather than the district court"); *Hageman v. City Investing Co.*, 851 F.2d 69, 71 (2d Cir. 1988) ("agree[ing] that a district court is better able than an appellate court to decide whether an interim appeal in a consolidated action is appropriate because the district court is already familiar with the purpose and type of consolidation"); *Spraytex Inc. v. DJS&T*, 96 F.3d 1377, 1382 (Fed. Cir. 1996).

B. District Court rulings on Rule 54(b) certifications in consolidated actions reflect their intimate familiarity with the circumstances weighing for or against appeal.

In a widely-cited opinion, the Third Circuit has collected the factors typically cited by District Courts in deciding whether to issue Rule 54(b) certifications:

> (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.

Allis-Chalmers Corp. v. Phila. Elec. Co., 521 F.2d 360, 364 (3d Cir. 1975) (footnotes omitted).[3] District Courts have evaluated these same factors in deciding

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Some Circuits have adopted contrary rules or rules attempting to stake out some middle ground. *See Trinity*, 827 F.2d at 675 (collecting cases).

[3] In practice, the first and third factors tend to overlap, as a close relationship between adjudicated and unadjudicated claims naturally correlates with a likelihood that separate appeals will require the Court of Appeals to consider the same issues more than once.

whether to certify one among several consolidated cases for appeal.[4] As their written decisions reflect, District Courts give careful consideration to these factors: they grant Rule 54(b) certifications when the circumstances warrant, but they may justifiably deny certification when an immediate appeal would burden the Courts of Appeals with piecemeal appeals or disrupt the District Court's resolution of the remaining claims.

1. ***Similarity of issues and the prospect of piecemeal appeals.*** — Whether an immediate appeal will overlap with the issues that remain pending in the District Court is a key factor—often the primary one—that District Courts consider in deciding whether to issue a Rule 54(b) certification. Neither the Court of Appeals nor the District Court benefits when an appeal splinters off the main body of the litigation, but the same issue remains pending in the District Court. First, the task before the District Court becomes more complex, because the court must balance the prospect of guidance from the Court of Appeals (which may come a year later, or never) against the need to keep the litigation moving. Either path can lead to wasted effort. Second, and relatedly, the result may be seriatim

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[4] *See, e.g.*, *GMAC Mortg., LLC v. Flick Mortg. Investors*, Inc., No. 09-0125, 2012 U.S. Dist. LEXIS 45989, at *9-17 (W.D.N.C. Mar. 31, 2012) (citing *Allis-Chalmers* factors in assessing request for Rule 54(b) certification for one of multiple consolidated cases); *Ctr. for Individual Freedom, Inc. v. Ireland*, No. 08-0190 et al., 2009 U.S. Dist. LEXIS 30831, *13-16 & n.2 (S.D. W. Va. Apr. 9, 2009) (same); *De Aguilar v. Nat'l R.R. Passenger Corp.*, No. 02-6527, 2006 U.S. Dist. LEXIS 11187, at *6-7 (E.D. Cal. Mar. 2, 2006) (same); *Genty v. Gloucester*, 736 F. Supp. 2d 1322, 1328 (D.N.J. 1990) (same).

appeals. Because individual cases may be similar but distinguishable, allowing each individual litigant to appeal as of right risks asking the Court of Appeals to adjudicate similar and related claims repeatedly.

Appellate courts "cannot afford the luxury of reviewing the same set of facts in a routine case more than once without a seriously important reason." *Wood v. GCC Bend, LLC*, 422 F.3d 873, 882 (9th Cir. 2005). Courts thus deny Rule 54(b) certifications when allowing an immediate appeal will "force the [Court of Appeals] to revisit facts, claims, or legal theories more than once." *DeFazio v. Hollister, Inc.*, No. 04-1358 *et al.*, 2008 U.S. Dist. LEXIS 3856, at *9 (E.D. Cal. Jan. 7, 2008) ("Plaintiffs have asserted claims against the remaining defendants, similar to those claims which the court has dismissed, arising out of the same facts and based on similar legal theories. . . . Once the remaining claims are resolved, there is a substantial likelihood that the non-prevailing parties will again appeal. . . .").

But when the circumstances of particular cases are such that an immediate appeal may advance the litigation without likely bringing the same issues to the Court of Appeals again, District Courts exercise their discretion to grant Rule 54(b) certifications. *See, e.g., In re Mass. Helicopter Airlines, Inc.*, 469 F.2d 439, 442-43 (1st Cir. 1972) (District Court reasonably granted Rule 54(b) certification because "the duty which forms the basis of any negligence action may well be different" from case to case); *Genty*, 736 F. Supp. at 1329-30 (granting certification in one case where "the defendants are entirely different parties" and "[t]he theories of liability in the two actions are different," while denying

certification in two other cases which "d[id] not presently stand in a posture warranting the entry of final judgment").

Ascertaining which scenario is more likely in any particular case is a highly case-specific judgment requiring thorough familiarity with the litigation. For instance, in *Rajala v. Gardner*, No. 09-2482, 2012 U.S. Dist. LEXIS 64067 (D. Kan. May 8, 2012), the District Court denied a Rule 54(b) certification in a case consolidated with another still-pending action, finding that the other case would likely result in another appeal and that "it would be better for the case to proceed to the Tenth Circuit at one time." *Id.* at *14. The Court's evaluation of those two possible scenarios was highly case-specific (*see id.* at *13), as will frequently be the case.

2. ***Prospect that future proceedings in the District Court will obviate the need for appeal.*** — Final decisions are appealable and tentative ones are not, because a District Court's refinement or reconsideration of a decision can eliminate the need for an appeal. One of the reasons Rule 54(b) requires a certification from the District Court is that until entry of a final judgment, "any order or other decision, however designated, . . . may be revised at any time." FED. R. CIV. P. 54(b). And that sort of revision is not uncommon in consolidated litigation. District Courts *do* recognize certain circumstances in which their own case-dispositive orders may warrant revision, and they reasonably deny certification when that prospect is real. In so doing, they save the Court of Appeals from having to decide what may be essentially an appeal from a tentative ruling. For example, in *In re Blech Sec.*

Litig., No. 94-7696, 1997 U.S. Dist. LEXIS 404 (S.D.N.Y. Jan. 16, 1997), the District Court noted:

> In this case, the claims against the Issuer Defendants are sufficiently intertwined with those against the remaining defendants that immediate appeal is inappropriate. The Section 10(b) and fraud claims that were dismissed as against the Issuer Defendants are still being litigated against the remaining defendants. . . . Additional evidence acquired in the course of discovery in the action against the remaining defendants could lead this court to modify its dismissal to permit repleading against the Issuer Defendants; such modification of an order is expressly permitted by Rule 54(b).

Id. at *6-7.

3. *Other factors.* — An inherent feature of consolidated cases is that multiple parties—often represented by different counsel—assert similar claims based on similar legal theories and the same underlying facts. The result is that appellate review in one case may result in a ruling binding on others. Separate and apart from whether that is an efficient use of appellate judicial resources—a determination, as discussed above, that is likely to vary from case to case—that reality also has serious ramifications on the litigants themselves. If the first plaintiff to have its claims dismissed in a consolidated case could bring an immediate appeal as of right, that invites "a scenario in which the [Court of Appeals] considers issues in the [other plaintiffs'] case, without the [other] plaintiffs being involved." *Winnett v. Caterpillar Inc.*, No. 06-0235 *et al.*, 2011 U.S. Dist. LEXIS 68407, at *19 (M.D. Tenn. June 24, 2011).

By contrast, a party's interest in participating in proceedings likely to affect its interests may sometimes cut in the other direction. In one illustrative case, the District Court granted a Rule 54(b) certification because ending the litigation without the intervening appeal "would place the Intervenor Defendants in the precarious situation, in the event of a successful appeal . . . , of being liable for an award of attorney's fees without having defended the merits of the case." *Ctr. for Individual Freedom*, 2009 U.S. Dist. LEXIS 30831, at *14. Ultimately, whether these considerations cut in favor of or against an immediate appeal is a case-sensitive question, not a categorical one. The District Court presiding over each case is in the best position to decide it.

II. District Court discretion to assess justifiable reasons for delay takes on particular importance in the MDL context.

The more complex the case, the more important the District Court's "dispatcher" function becomes. As complexity increases, it is even less likely that anyone else can rival the District Court's knowledge of the facts and circumstances. Even more clearly than in run-of-the-mill cases, the District Court is the one "most likely to be familiar with the case" and all of the competing factors weighing in favor of, or against, an immediate appeal. *Sears*, 351 U.S. at 437; *Curtiss-Wright*, 446 U.S. at 10.

And some of the most complex cases of all are MDLs. "Handling one (or more) of these difficult groups of cases is perhaps the greatest challenge that could be thrust upon a federal judge." Hon. John G. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2243-44 (2008). MDL

transferee Judges are given wide discretion to coordinate and consolidate cases in the manner most effective for advancing the litigation—and part of that includes the discretion they exercise in determining when the component parts are ready for appellate review. Just as significantly, the manner in which cases are consolidated or coordinated in an MDL can take many different forms, can change on the fly as necessary to promote the efficient resolution of the MDL as a whole, and may be difficult to discern from the docket entries alone. All of these factors support the view that determining when a constituent case in consolidated MDL proceedings is ripe for appeal is, and should be, highly discretionary, and the District Judge presiding over the MDL is in the best position to exercise that discretion effectively.

A. The considerations relevant to the Rule 54(b) analysis are even more nuanced in MDL consolidations.

District Courts overseeing MDLs frequently issue orders that dispose of entire constituent actions that are consolidated with others, as petitioners' case was here. If no Rule 54(b) certification were necessary to take an appeal in that context, litigants would have no reason to seek them and courts would have no reason to grant or deny them. But litigants do, in fact, seek them, and MDL courts do, in fact, frequently grant them. Those courts use the same kind of case-sensitive analysis as in other consolidated cases. If anything, the scale and complexity of consolidated MDLs and the issues they present make it even more important in the MDL context to place the decision in the hands of a judicial officer who can weigh those considerations.

1. ***Similarity of cases and the prospect of piecemeal appeals.*** — Piecemeal appeals are at least as great a risk in the MDL context as in other consolidations. MDLs are established precisely because every constituent case presents at least one common issue (though frequently there are significant differences among the actions as well). 28 U.S.C. § 1407. District Courts overseeing MDLs are well-positioned to assess when a Rule 54(b) certification is unlikely to result in inefficient, duplicative appeals, and in such cases they grant certification.

For example, the District Court in *In re South African Apartheid Litigation*, No. 02-1499, 2009 WL 3364035 (S.D.N.Y. Oct. 19, 2009), found "no just reason for delay" of an appeal in an "action . . . consolidated with other actions," because the claims to be certified for appeal were "based on distinct allegations" and thus "separable from the claims against the remaining defendants." *Id.* at *1. They therefore "could be decided independently from the other claims." *Id.* The Court noted that the interest in "helping to avoid piecemeal appeals" weighed in favor of a Rule 54(b) certification because other parties were already seeking appellate review and certification offered "the opportunity to have the[] appeal heard roughly simultaneously with the pending appeal." *Id.*; *see also, e.g.*, *In re Mortg. Elec. Reg. Sys. (MERS) Litig.*, No. 09-2119, 2011 WL 4550189, at *12 (D. Ariz. Oct. 3, 2011) (finding "no just reason to delay the appeal" of an order dismissing 72 member cases, even though "several member cases remain[ed]") (quoting *Curtiss-Wright*, 446 U.S. at 8).

Conversely, MDL courts consciously avoid dispatching a part of the litigation to the Court of Appeals when the contemplated appeal is likely to be the first of many on the same issue. *See, e.g.*, *In re Refrigerant Compressors Antitrust Litig.*, No. 09-2042, 2013 U.S. Dist. LEXIS 109410, at *24-27 (E.D. Mich. Aug. 5, 2013) (Rule 54(b) certification not warranted because "the adjudicated and pending claims are closely related and stem from the same factual allegations," thus should "be confronted by the appellate court in a unified package").

The sheer number of cases in an MDL that may present similar—but not quite identical—claims results in situations where MDL courts adjudicate such claims serially and develop their legal analysis incrementally from case to case. For example, *In re Vioxx Products Liability Litigation*, MDL No. 1657, contained "cases transferred from every State in the Union," conceivably presenting the District Court "with the task of applying each state's statute of limitations in this multidistrict litigation." *In re Vioxx Prods. Liab. Litig.*, 478 F. Supp. 2d 897, 902 (E.D. La. 2007). The District Court regarded that as "a daunting task and one not to be undertaken until the litigation had matured," 522 F. Supp. 2d 799, 801 (E.D. La. 2007), and thus the former decision addressed the limitations issue with respect to "only three cases." 478 F. Supp. 2d at 902. In future rulings, the Court performed similar inquiries into the applicable statute of limitations and related tolling and concealment doctrines for other cases and other states. *E.g.*, *Roach v. Merck & Co. (In re Vioxx Prods. Liab. Litig.)*, No. 10-0868, 2012 U.S. Dist. LEXIS 77613, at *9-13 (E.D. La. June 5, 2012) (addressing Illinois statute of limitations and

discovery rule). But while such an iterative approach may be highly effective for managing the MDL at the District Court level, it is not necessarily effective for managing the inevitable appeals. If each constituent action could be appealed as of right every time the District Court dismissed a claim as time-barred, different panels of the Court of Appeals would be required to acquaint themselves with a complex factual landscape only to perform a legal analysis with substantial (but not complete) overlap from case to case—for example, adjudicating a claim subject to a two-year state statute of limitations in one case and an otherwise identical claim subject to a three-year statute of limitations in another.

Furthermore, premature appeals affect District Judges' ability to manage their docket even more significantly in the context of MDLs. *See* Resps.' Br. 45-48. MDLs are challenging enough as it is. Adding the further complication of staying portions of discovery, consideration of individual claims, or both would make them significantly more difficult to manage—and significantly more difficult to shepherd towards a final resolution or settlement.[5] Yet that

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[5] Judges presiding over MDLs often take a more active role than usual in guiding cases to settlement by, for example, "select[ing] particular plaintiffs' cases whose trials will furnish data that may facilitate settlement of the remaining cases." *Bell v. Keystone RV Comp. (In re FEMA Trailer Formaldahyde Prods. Liab. Litig.)*, 628 F.3d 157, 160 (5th Cir. 2010); *see also, e.g., In re Nineteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litig.*, 982 F.2d 603, 605 (1st Cir. 1992) (MDL Judge "determined that the plaintiffs should try twelve representative claims as a means of facilitating settlement"). In the *Vioxx* MDL, after just "six bellwether trials," the parties achieved a settlement of "over 99% of the individual cases" amounting to some $4.35 billion. *In re Vioxx Prods. Liab. Litig.*,

would be the result of allowing constituent cases to go up on appeal, *as of right*, even when closely related issues remain pending in the MDL court.

Just as discussed above in the context of consolidated cases, *supra* Part I.B, there are often strong reasons why all the litigants raising a particular claim should be heard by the Court of Appeals at the same time. The District Court is in the best position to judge whether (for example) the first constituent case to be dismissed is a poor bellwether. The Courts of Appeals, the other litigants, and judicial administration more generally are better served by allowing the District Court to make that judgment.

2. ***Prospect that future proceedings in the District Court will obviate the need for appeal.*** — The need to separate final decisions from tentative ones—in which further proceedings in the District Court may negate the need for an appeal or alter the landscape with which the appellate court must contend—applies with extra force in the MDL context. District Courts handling MDLs may well have reason to revisit their prior determinations—especially because MDLs often contain numerous different sets of litigants on each side of the "v.," each of them able to add new arguments and new factual permutations. Before considering an issue wrapped up for purposes of the entire MDL, a District Court is entirely justified in revisiting earlier rulings to

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2014 U.S. Dist. LEXIS 397, at *4 (E.D. La. Jan. 3, 2014). But a Court cannot effectively advance cases to that point if pending appeals continually threaten to alter the landscape of the cases still before it.

harmonize them with the lessons learned from the other constituent cases in the MDL.

For example, *In re Countrywide Mortgage-Backed Securities Litigation*, MDL No. 2265, includes a series of cases in which plaintiffs argue their claims are timely because the applicable statute of limitations was tolled by the filing of an earlier class-action complaint in state court. *See Am. Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974) (establishing the class-action tolling doctrine). In an early ruling in the MDL, the District Court agreed with the defendants that *American Pipe* tolling did not apply and thus dismissed the plaintiffs' claims as time-barred, but it rejected the defendants' argument that a class action filed in a state court can *never* trigger the tolling doctrine. See *Me. State Ret. Sys. v. Countrywide Fin. Corp.*, 722 F. Supp. 2d 1157, 1166 (C.D. Cal. 2010). Two years later, in another proceeding in the MDL, the Court stated, "Upon closer review, the Court is no longer convinced that this conclusion was correct," and announced "a change in the Court's analysis of existing case law." *FDIC as Receiver for Strategic Capital Bank v. Countrywide Fin. Corp.*, No. 12-4354, 2012 U.S. Dist. LEXIS 167696, at *41 (C.D. Cal. Nov. 21, 2012). If an immediate appeal had been taken from the 2010 *Maine State* dismissal, it may have been rendered entirely moot by the 2012 *Strategic Capital Bank* decision dismissing analogous claims on alternative grounds. Requiring parties to obtain a Rule 54(b) certification to take such an appeal ensures that the District Court itself has determined that the case has reached the point that the issues presented are not subject to being revisited in a future proceeding.

The Court actually overseeing the MDL obviously knows better than anyone else whether it may consider "revis[ing]" one of its orders later in the litigation. FED. R. CIV. P. 54(b). Once courts are satisfied that they are finished, they can and do issue Rule 54(b) certifications. *See, e.g., Brown v. Am. Home Prods. Corp. (In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.)*, No. 99-20593, 2008 WL 2890878, at *1 (E.D. Pa. July 21, 2008) (granting certification because the court "d[id] not intend to revisit the awards [it had] made" and "[t]he vast majority of the work in connection with the Settlement Agreement and the MDL ha[d] concluded").

Relatedly, sometimes the direction in which a litigation is likely to go is so uncertain that the District Court leaves open the option of revising its decision on the Rule 54(b) certificate *itself*. *See, e.g., In re Fresh & Process Potatoes Antitrust Litig.*, No. 10-2186, 2012 WL 1288752, at *2 (D. Idaho Apr. 16, 2012) ("The Court cannot predict precisely how this litigation will develop, but it may be that future developments would cause the Court to reconsider its position as to Dole's request for Rule 54(b) certification."); *In re Wash. Mut., Inc. Sec., Deriv., & ERISA Litig.*, No. 08-1919, 2010 WL 148126, at *2 (W.D. Wash. Jan. 11, 2010) (denying Rule 54(b) certification "without prejudice to bring[ing] a renewed motion after the Court rules on class certification"). Because the conditions that make an MDL decision appropriate, or inappropriate, for appeal are so fluid, any *per se* rule that removes the District Judge's assessment from the equation is particularly inappropriate in this context.

B. Deference to District Court discretion over appeals in constituent cases promotes the efficient administration of MDLs.

"[M]ultidistrict litigation is a special breed of complex litigation where the whole is bigger than the sum of its parts. The district court needs to have broad discretion to administer the proceeding as a whole, which necessarily includes keeping the parts in line." *Allen v. Bayer Corp. (In re Phenylpropanolamine (PPA) Prods. Liab. Litig.)*, 460 F.3d 1217, 1232 (9th Cir. 2006). "For it all to work, multidistrict litigation assumes macro-, rather than micro-, judicial management because otherwise, it would be an impossible task for a single district judge to accomplish." *Id.* at 1231. Deference to the District Court's discretion as to whether separate appeals from constituent cases will indeed "keep[] the parts in line" is vital for ensuring the efficient administration of MDLs, while an alternative rule that permits litigants themselves effectively to un-consolidate cases for appeal is fundamentally contrary to the "macro"-level management the MDL process contemplates. It is also contrary to "a key principle of the multi-district scheme," "the accrual of judicial expertise." *Kinley Corp. v. Integrated Resources Equity Corp. (In re Integrated Resources, Inc. Real Estate Limited P'ships Sec. Litig.)*, No. 92-4555, 1995 U.S. Dist. LEXIS 5181, at *11 (S.D.N.Y. Apr. 21, 1995).

In *In re FedEx Ground Package System, Inc. Employment Practices Litigation*, MDL No. 1700, 2011 U.S. Dist. LEXIS 107272 (J.P.M.L. Sept. 22, 2011), the Judicial Panel on Multidistrict Litigation had occasion to make the following observation in

refusing to review the legal correctness of a District Court's decision refusing to grant a Rule 54(b) certification in lieu of remand:

> There are sound reasons why this deference has proven so essential and successful over the many years of our experience; in most instances the transferee judge has an acute sense about the procedural steps necessary to advance the litigation in the fairest and most efficient way. Here, when Judge Miller suggested remand of these actions, he was in the best position to consider the relative efficiencies . . . .

Id. at *3. The parallels to this Court's statements in *Sears* and *Curtiss-Wright* are clear: the District Judge's ability to "explore all the facets of a case," *Curtiss-Wright*, 446 U.S. at 12, places it in the ideal position to evaluate "the procedural steps necessary to advance the litigation in the fairest and most efficient way." *FedEx*, 2011 U.S. Dist. LEXIS 107272, at *3.

This Court is nevertheless faced with the question whether the District Court's views on how to manage appeals from an MDL it is handling should be ignored, and its discretion eliminated. Petitioners believe that the answer is yes and that constituent cases in MDLs "maintain their individuality" (Pet. Br. at 20), even in the face of an explicit consolidation order from the District Judge presiding over the MDL. Pet. App. 10a-11a. *See generally* Jacqueline M. Gerson, *Comment: The Appealability of Partial Judgments in Consolidated Cases*, 57 U. CHI. L. REV. 169, 183 (1990) (noting that the per se rule treating each constituent case as though it were a separate, individual case "yields no

discretion to the courts" and "allow[s] litigants to 'un-consolidate' cases"). Without commenting definitively on the correctness or incorrectness of that position under the applicable statute, rules, and case law, the *amici curiae* respectfully submit that adopting that position will seriously hinder the ability of District Courts to "keep[] the parts [of an MDL] in line." *Allen*, 460 F.3d at 1232.

Similar problems would arise from the supposed middle-ground approach—a ruling that judgments in constituent cases in an MDL are appealable "on a case-by-case basis," depending on "the extent of consolidation." *Spraytex*, 96 F.3d at 1380. While this approach might appear to preserve the District Court's discretion to coordinate the parts of an MDL in the manner it sees fit, in practice the ultimate discretionary decision would be made by the Court of Appeals, not the District Court. And Courts of Appeals attempting to undertake that "case-by-case" analysis from a paper record, divorced from the District Judge's personal familiarity with the action, tend to find that the determination is no simple matter.[6]

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[6] *See generally* Gerson, 57 U. CHI. L. REV. at 186 ("Several problems inhere in relying on appeals courts to make case-by-case determinations of the desirability of appeals. First, a trial court is in a better position than an appeals court to evaluate the need for and consequences of an immediate appeal. The district court has first-hand knowledge of the claims, the parties, and the evidence; the appeals court only reviews a paper record. Since it consolidated the cases in the first place, the district court is also more familiar with the purpose of the consolidation, the overlap of issues, and the degree of consolidation. Hence, a district court is better positioned than an appellate court to assess the effects on the parties and the

The Eighth Circuit, for example, will not exercise jurisdiction over an appeal from one case in a consolidated action when there has been a "technical consolidation into a single action," but *will* exercise jurisdiction when "the consolidation is an arrangement for joint proceedings and hearings, for convenience." *Tri-State Hotels v. FDIC*, 79 F.3d 707, 711-12 (8th Cir. 1996) (quoting *Mendel v. Prod. Credit Ass'n of the Midlands*, 862 F.2d 180, 182 (8th Cir. 1988)) (brackets omitted). But that distinction is murky and difficult to apply. The result in *Tri-State Hotels* was that the Eighth Circuit was forced to divine the significance of particular indicia in the record—that "the district court did not clearly state whether the two lawsuits were formally merged for all purposes"; that "[w]hile the district court grouped both suits under a single docket number, this grouping appears to have been only to 'simplify the filing process'"; that the district court referred to the cases as "two suits"; and that "the district court termed [one of the suits] 'related litigation' rather than 'other matters in this case.'" *Id.* at 712. It is difficult to imagine how the Court of Appeals could have limned the precise contours of the consolidation intended by the District Court more reliably than the District Court itself.

Seeking to place the onus on the District Court, the Eighth Circuit ultimately remarked, with palpable exasperation:

> Our appellate consideration would be made considerably easier if the district court could regularly state on the record whether

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judicial system of allowing an early appeal.") (footnotes omitted).

> consolidated cases have been "formally merged, for all purposes," or whether the consolidation is "informal, for convenience only." Such a statement would provide a very useful bright line in this area.

Id. at 712 n.5. But a more useful (and equally clear) standard is the one that Rule 54(b) already contemplates. Treating individual judgments in consolidated cases as ripe for appeal *only* when the District Court expressly certifies them as such under Rule 54(b), based on its own firsthand knowledge of the nature and purpose of the consolidation, avoids the problem that frustrated the Eighth Circuit.

The inquiry the Eighth Circuit performed—just how consolidated are these cases?—is likely to be *especially* difficult and problematic in the MDL context, because MDL consolidations can take many different forms and change over time as the MDL evolves. Courts may also adjudicate cases in an effectively consolidated fashion without a formal consolidation order, because at the early stages of the MDL it may not yet be clear what type of consolidation the court will ultimately find appropriate. Alternatively, courts may find that small differences among cases in an MDL justify adjudicating some of them separately or incrementally without consolidating them formally. In such circumstances, the original order from the MDL Panel transferring the scheduled cases for "coordinated or consolidated pretrial proceedings" (28 U.S.C. § 1407(a)) may be the only formal consolidation order, but that itself should suffice to justify deference to the District Court as to how to manage the moving parts. *See, e.g., Krys v. Sugrue (In re Refco Inc. Sec. Litig.)*, 859 F. Supp. 2d 644,

648-49 (S.D.N.Y. 2012) (rejecting argument "that without a formal consolidation order or joinder, the actions do not 'proceed as a single action,'" and stating that "[t]his MDL proceeding coordinates discovery and other pre-trial proceedings, and the actions in it are accordingly proceeding as a single action for numerous purposes.").

The purposes for which cases are consolidated in an MDL will differ from case to case and will evolve as the MDL itself evolves. No one is in a better position to assess those purposes than the District Judge. There is no need for a Court of Appeals to scour a paper docket to divine the nature of consolidation intended by the District Court, when it can simply take note of the presence or absence of a certified final judgment as the definitive indication whether the District Court has adjudged any of the component parts of the consolidated proceedings ready for review. That rule places the discretionary judgment exactly where it should reside: with the District Judge intimately familiar with the litigation and all of its component parts.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted.

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